**Wal-Mart Stores, Inc.** ***and*** **United Food and Commercial Workers Union, Local Union 99R, CLC** ***and*** **United Food and Commercial Workers International Union, CLC.**[1] Cases 28–CA–16832, 28–CA–17774, and 28–CA–17774–2

June 30, 2008

DECISION AND ORDER[2]

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

At issue in this proceeding is whether the Respondent's conduct in response to a union organizing drive among the Tire and Lube Express (TLE) employees at its Kingman, Arizona facility violated Section 8(a)(1) and 8(a)(3) of the Act. We find, in agreement with the judge,[3] that the Respondent granted a benefit to employees, in violation of Section 8(a)(1), by repairing the cooling system in the TLE in order to induce employees to refrain from supporting the Union.[4] We further agree with the judge that the Respondent violated Section 8(a)(3) and (1) by discharging employee Brad Jones and denying him COBRA benefits, and by disparately failing to enforce its no-harassment policy to protect employees Will Brooks and Greg Lewis from the harassing statements of employee Mitch Bowman.[5]

As explained below, we also affirm the judge's finding that the Respondent unlawfully threatened to freeze discretionary merit wage increases during initial bargaining if the employees voted for union representation.[6]

However, for the reasons set forth below, we reverse the judge's finding that the Respondent unlawfully surveilled employees and created an impression of surveil-

[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005, as well as to reflect our earlier severance of Case 28–CA–17141.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the National Labor Relations Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] On February 28, 2003, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs. The General Counsel, the Respondent, and the Charging Party filed answering briefs and the General Counsel and the Respondent filed reply briefs. On September 29, 2006, the Board found that any attorney-client privilege asserted as to the Respondent's "remedy system" files had been waived, and remanded this proceeding to the judge to reopen the record to receive relevant documents from the Respondent's remedy system and related evidence bearing on the parties' pending exceptions. 348 NLRB 833.

On March 30, 2007, the judge issued the attached supplemental decision and order. The General Counsel, the Respondent, and the Charging Party filed exceptions and supporting briefs. The General Counsel and the Respondent filed answering briefs and reply briefs. On June 12, 2007, the Board granted, in part, the Respondent's motion to strike certain of the Charging Party's exceptions as untimely.

The Board has considered the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Orders as modified and set forth in full below.

At the hearing on remand, and in his supplemental decision, the judge refused the General Counsel's and the Charging Party's requests to question witnesses concerning the remedy system documents as they pertained to the Respondent's exceptions, and instead limited their questioning to the General Counsel's single exception. The General Counsel and the Charging Party contend that the judge's ruling was contrary to the Board's remand order that required the production of Respondent's remedy system documents relevant to both the General Counsel's exception and the Respondent's exceptions. We reject this argument. The judge permitted the General Counsel to make an offer of proof regarding the matters about which the witnesses would testify if called. The General Counsel's proffer did not identify anything in the remedy system documents that would require further testimony, specify witnesses who would have been called, or indicate the substance of their testimony. Thus, even assuming that the judge's procedural ruling was erroneous we find no showing that the error was prejudicial.

The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] Because any additional 8(a)(1) grant of benefits finding would be cumulative, and would not affect the remedy, we find it unnecessary to decide whether the Respondent unlawfully granted benefits to employees by replacing the oil grates in the TLE and by transferring Store Manager Mike Buckner.

[5] In finding these 8(a)(3) violations, the judge applied the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). When describing the prima facie showing required under *Wright Line*, the judge stated that the General Counsel must establish four elements—(1) the existence of protected activity; (2) employer knowledge of that activity; (3) adverse employment action suffered by alleged discriminatees; and (4) a link, or nexus, between the employees' protected activity and the adverse employment action. As stated recently in *Gelita USA, Inc.*, 352 NLRB 406 fn. 2 (2008), "Board cases typically do not include (4) as an independent element." See, e.g., *SFO Good-Nite Inn, LLC*, 352 NLRB 331, 332 (2008). However, because *Wright Line* is a causation analysis, Chairman Schaumber agrees with the judge's addition of the fourth element. See, e.g., *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003).

In agreeing with the judge that the General Counsel met his burden of establishing a prima facie 8(a)(3) case with respect to the Respondent's application of its no-harassment policy and its treatment of Jones, we do not rely on his finding that union animus may be inferred from the Respondent's having "engaged in a very aggressive campaign to defeat the Local Union's organizing efforts." Further, because, as discussed infra, we have reversed the judge and found that the Respondent's 9-day assignment of Tim Scott to the TLE manager position did not constitute unlawful surveillance or create the impression of surveillance, we do not rely on it as evidence of union animus.

[6] In the absence of exceptions, we also affirm the judge's dismissal of all remaining allegations.

lance when it assigned Regional Personnel Manager Tom Scott to be the interim TLE manager.[7]

Background

During the summer of 2000, the TLE employees contacted United Food and Commercial Workers, Local Union 99R.[8] The Union filed a representation petition on August 28.[9] On August 30, a labor relations team from the Respondent's Bentonville, Arkansas headquarters arrived at the Kingman store. Senior Labor Manager Vicky Dodson headed up the team. Among other things, the labor team gathered information about the organizing effort and met with employees. The team also met with regional, district, and visiting managers and held conference calls with the Respondent's legal team on a daily basis.

Threat to Postpone Merit Wage Increases

Soon after its arrival at the Kingman facility, the Respondent's labor relations team had a "question box" installed outside the breakroom for employees to deposit any questions they had about the effects of union representation. The labor team checked the box daily and posted questions and answers for the employees to see. In response to the question (submitted while the representation petition was pending) "What happens to raises in the TLE while they're waiting on a contract?", the Respondent on October 14 posted the following response:

> Wal-Mart would not be allowed to give any discretionary raises, such as merit increases, while negotiations continued. In general, no provision of a collective-bargaining agreement is put in place until the parties agree on every part of the agreement.

The judge found that the Respondent had a past practice of granting merit increases that were discretionary in amount. As such, he found that these increases were an "existing benefit" which could not lawfully be discontinued unilaterally while the petition for an election was pending. Accordingly, the judge found that the Respondent violated Section 8(a)(1) by stating in its October 14 response that employee merit increases would be discontinued.

Although we agree with the judge's 8(a)(1) finding, we do not agree with the legal standard on which he relied. The judge relied on precedent setting forth the obligations of an employer to maintain the status quo as to wages and benefits during a union organizing drive. As we explained in *Sam's Club*, 349 NLRB 1007, 1012 (2007), "[A]n employer faced with a union organizing drive is required to proceed with an expected wage or benefit adjustment as if the union were not on the scene."

Here, however, the question posed by the employees focused on the postcertification period, and asked what would happen to employee merit increases "while they're waiting on a contract" to be negotiated. The legal standard applicable to wage increases in this context, as set forth in *NLRB v. Katz*, 369 U.S. 736 (1962), and *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997), is that when employees are represented by a labor organization, their employer may not make unilateral changes in their terms and conditions of employment. Id. As set forth in *Jensen Enterprises*, 339 NLRB 877 (2003):

> [F]ollowing its employees' selection of an exclusive bargaining representative, an employer may not unilaterally discontinue a practice of granting periodic wage increases. . . .
>
> Hence, an employer's statement that wages will be frozen until a collective-bargaining agreement is signed violates Section 8(a)(1) of the Act if the employer has a past practice of granting periodic wage increases. Such an announcement suggests to employees that the employer intends to unilaterally take away benefits and require the union to negotiate to get them back. [Citations omitted.][10]

The Respondent's answer to the question submitted by its employees clearly violated its obligations under *Katz* and *Daily News*. As in *Jensen Enterprises*, it told employees that it would not grant them merit increases during negotiations for a collective-bargaining agreement. Accordingly, we affirm the judge's finding that the Respondent's answer constituted a threat to withhold an established benefit and violated Section 8(a)(1).

Alleged Surveillance and Creation of the Impression of Surveillance in the TLE

Regional Personnel Manager Tim Scott, who arrived with the labor relations team, was assigned by Dodson to act as interim manager of the TLE for the first 9 days he was at the store, even though he had no TLE or automotive experience. The General Counsel alleged, and the

[7] In an unpublished order dated September 26, 2006, the Board severed and remanded for settlement the complaint allegations regarding statements in the Respondent's benefits book that the judge found unlawful in Sec. III,C,13 of his decision.

[8] Hereafter, all dates are in 2000, unless otherwise stated.

[9] The Regional Director issued a Decision and Direction of Election on September 29. The election, which was scheduled for October 27, was blocked by the charges filed in this case on October 24.

[10] If the employer follows through with its announcement, it violates Sec. 8(a)(5) and (1). See *Mission Foods*, 350 NLRB 336, 336–338 (2007).

judge found, that while assigned to the TLE, Scott engaged in surveillance of the employees' union activities and created an impression of surveillance. The Respondent has excepted to these findings, and we find merit in the exceptions.

At the time the petition was filed, TLE Manager Larry Eidson was on an extended medical leave.[11] While Edison was on leave, Hillary Vergara, a manager trainee from another department within the store, served for a brief time as an interim manager of TLE. Like Scott, Vergara had no TLE or automotive experience. After Vergara transferred to another store in late July, no one was assigned to manage the TLE until Scott took over on August 30.

During his managerial tenure in TLE, Scott worked from opening until closing and spent most of his time on the floor assisting employees and engaging them in conversations about TLE operations. On September 7, Scott assumed other duties at the store and Ragnar Guenther, the new district TLE manager, succeeded him as the interim manager until Eidson's return.

The judge found that Scott's presence "must have had a significant impression on the automotive service technicians." He observed that Scott was a high-ranking manager and a member of the labor relations team that had been dispatched by headquarters immediately after the petition was filed, and that the team's acknowledged job was to gather information about what employees wanted and their union sympathies. The judge reasoned that the employees were aware that Scott had no experience in TLE work and was not qualified for the manager's job, and found that employees reasonably would have assumed that he was assigned to the TLE primarily to observe whether they were engaged in union activity. Accordingly, the judge concluded that the Respondent violated Section 8(a)(1) by giving employees the impression of surveillance. In view of the labor relations team's stated purpose, the judge also found that the Respondent engaged in actual surveillance of the TLE employees' union activity in violation of Section 8(a)(1). For the reasons discussed below, we disagree.

The record establishes that when Scott and Dodson arrived at the Kingman store, they found the store in disarray and the TLE without a manager. As the Respondent points out, although Scott was inexperienced, so was his predecessor Vergara. Thus, the Respondent's appointment of an interim manager without TLE experience was not unprecedented. Moreover, there is no evidence that any more qualified individual was readily available to manage the TLE. On this record, then, it appears that Dodson simply assigned Scott to work as a manager where a manager was needed, and then only for a brief period until an interim manager with automotive experience arrived. Scott spent 9 days heading up the TLE operation in an unremarkable fashion, working from opening to closing, side by side with the automotive employees until Guenther succeeded him.[12]

The Board has long held that management officials' observation of public union activity, particularly where such activity occurs on company premises, does not violate Section 8(a)(1) of the Act, unless officials do something out of the ordinary. See, e.g., *Sprain Brook Manor Nursing Home*, 351 NLRB 1191, 1192 (2007) (manager who never worked on Saturdays and who stood in doorway of building for 3 hours on a Saturday watching a union organizer distribute literature to employees engaged in unlawful surveillance). Here, however, there is no evidence that Scott engaged in extraordinary conduct that would indicate that the employees' exercise of Section 7 rights was under surveillance. To the contrary, the record indicates that he simply worked in the TLE alongside the other employees as a normal manager.

As the judge stated, the test for determining whether an employer has created an impression of surveillance is whether the employees would reasonably assume from the employer's actions or statements that their union activities had been placed under surveillance. See, e.g., *Waste Stream Management*, 315 NLRB 1099, 1124 (1994). In the present circumstances, it is more likely that the employees would view Scott's presence as a stopgap assignment to their department of a sorely needed manager[13] rather than as an effort to surveill their union activity. Accordingly, in the absence of additional evidence, we find that the General Counsel has not established that the Respondent engaged in surveillance or created an impression of surveillance.

## ORDER

The Respondent, Wal-Mart Stores, Inc., Kingman, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting benefits and improved working conditions to discourage employees from supporting the Local Union.

(b) Threatening its employees with a loss of merit wage increases for supporting the Local Union.

[11] Eidson was on leave from July through late September.

[12] The judge dismissed allegations that Scott solicited grievances and promised to remedy them. No exceptions have been filed to those dismissals.

[13] Dodson's notes indicate that employees were concerned about the lack of a manager in TLE because without a manager there would be no one to recommend them for merit wage increases.

(c) Discriminatorily and disparately applying and enforcing its no-harassment policies to the detriment of employees who supported the Local Union.

(d) Discharging, denying COBRA coverage to, or otherwise discriminating against any of its employees for supporting the Local Union or any other union.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Apply and enforce its no-harassment policies in a fair and impartial manner so as not to discriminate to the detriment of supporters of the Local Union.

(b) Within 14 days from the date of this Order, offer Brad Jones full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Brad Jones whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, including any out of pocket medical costs incurred because of his denial of COBRA coverage, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Brad Jones, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Kingman, Arizona, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Kingman facility at any time since September 2000.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the United Food and Commercial Workers Union, Local Union 99R, CLC (the Local Union), or any other union.

WE WILL NOT deny you COBRA medical insurance coverage for supporting the Local Union or any other union.

WE WILL NOT apply and enforce our no-harassment policies in a disparate and discriminatory manner to the harm and disadvantage of those of you who support the Local Union or any other union.

WE WILL NOT grant benefits or improvements in working conditions to you in an effort to discourage you from supporting the Local Union or any other union.

WE WILL NOT threaten you with a loss of your merit wage increases if you select the Local Union or any other union as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL within 14 days from the date of the Board's Order, offer Brad Jones full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Brad Jones whole for any loss of earnings and other benefits resulting from his discriminatory discharge, less any net interim earnings, plus interest.

WE WILL make Brad Jones whole, including interest, for any out of pocket medical costs incurred because of the discriminatory denial of COBRA medical insurance coverage.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Brad Jones, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL apply and enforce our no-harassment policies in a fair and impartial manner so as not to discriminate to the harm and disadvantage of the supporters of the Local Union or any other union.

WAL-MART STORES, INC.

*Paul Irving, Esq.,* for the General Counsel.
*Lawrence A. Katz, Steven D. Wheeless,* and *Karen L. Karr,* of Phoenix, Arizona, for the Respondent.
*Lisa Pederson,* of Washington, D.C., for the Charging Parties.

## DECISION

### STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Kingman, Arizona, on June 11–14, September 3–6, and 9–13, 2002. United Food and Commercial Workers Union, Local Union 99R, AFL–CIO, CLC (the Local Union) filed an unfair labor practice charge and amended charge in Case 28–CA–16832 on October 24 and December 27, 2000, respectively. The Local Union filed an unfair labor practice charge and amended charge in Case 28–CA–17141 on April 23, 2001, and May 3, 2002, respectively. United Food and Commercial Workers International Union, AFL–CIO, CLC (the International Union) filed an unfair labor practice charge in Case 28–CA–17774 on February 27, 2002, and filed an unfair labor practice charge in Case 28–CA–17774–2 on March 5, 2002. Based on those charges, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a consolidated complaint on May 24, 2002. The consolidated complaint alleges that Wal-Mart Stores, Inc. (the Respondent, the Employer, or Wal-Mart) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the consolidated complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Respondent, and counsel for the Local Union and the International Union (collectively the Unions or the Charging Parties), and my observation of the demeanor of the witnesses,[1] I now make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a Delaware corporation, with offices and places of business located throughout the United States, including its Store 2051 in Kingman, Arizona (the Respondent's facility), where it is engaged in the operation of retail stores. Further, I find that during the 12-month period ending October 24, 2000, the Respondent, in the course and conduct of its business operations, purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Arizona. During the same period of time, the Respondent derived gross revenues in excess of $500,000.

Accordingly, I conclude that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. LABOR ORGANIZATIONS

The complaint alleges, the answer admits, and I find that at all times material, the Local Union and the International Union have each been labor organizations within the meaning of Section 2(5) of the Act.

#### III. ALLEGED UNFAIR LABOR PRACTICES

##### *A. The Dispute*

The General Counsel alleges that the Respondent's supervisors and agents have engaged in a campaign designed to defeat the Local Union's organizing effort among a unit of employees in the Kingman, Arizona facility's Tire and Lube Express (TLE). According to the General Counsel's theory of the case, the Respondent's local, regional, and corporate officials pursued a policy designed to interfere with, restrain, and coerce the employees in the exercise of their Section 7 rights. This conduct is also alleged to have discriminated in regard to the tenure or terms or conditions of employment of the TLE employees, all in an effort to discourage support for the Local Union.

It is alleged in the complaint that the Respondent's supervisors and agents repeatedly solicited employee grievances and complaints, and promised its employees increased benefits and improved terms and conditions of employment, and that it

[1] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

would remedy employees' grievances if they refrained from union organizational activity. Further, it is charged that the Respondent granted certain specific benefits and improved working conditions for the TLE employees and other employees in an effort to get them to refrain from supporting the Local Union. These benefits allegedly included new equipment, an improved cooling system, and the suspension of a computer generated scheduling system for TLE employees, as well as, the removal of an unpopular store manager.

The complaint alleges that certain of the Respondent's supervisors and agents engaged in surveillance, or created the impression of surveillance, of employees' union and other concerted activities. Employees were allegedly informed that it would be futile for them to select the Local Union as their bargaining representative, as the Respondent need not negotiate. Also, it is charged that employees were threatened with loss of raises, stakeholder bonuses, and discount cards if they selected the Local Union as their bargaining representative.

It is further alleged in the complaint that the Respondent disparately applied and enforced it's nonharassment policies to the detriment of employees who supported the Local Union, and that it increased the work duties and tasks of employees Brad Jones and Larry Adams because of their support for the Local Union. The Respondent is alleged to have discharged Jones and denied him COBRA benefits because of his union and concerted activities. Also, it is charged that the Respondent denied the request of several employees to have coworkers present during investigatory interviews, which interviews the employees had reasonable cause to believe would result in disciplinary action. Additionally, these employees were allegedly threatened with reprisals for refusing to waive their right to have a coworker present.

Finally, it is alleged that at all of its stores throughout the United States, the Respondent has maintained in its associate benefits book a provision which indicates that union represented employees are not eligible for certain benefits to which most other employees are entitled. This provision is allegedly intended to chill employees' Section 7 rights.

The Respondent denies the commission of any unfair labor practices.[2] The Respondent argues that it has a corporate philosophy based on an "open door" policy. This policy strongly encourages employees throughout the Respondent's corporate structure to take their ideas, concerns, suggestions, and problems directly to management. Employees are told frequently, both orally and in writing, that they can go as high as they want within the management structure, including even to the Employer's chief executive officer, in seeking guidance under the "open door" policy. In explaining its policy to employees, the Respondent stresses that while an employee will always receive an answer to the inquiry, there is no guarantee that it will be the answer the employee is looking for. In any event, employees are told that if dissatisfied with any answer, they are at liberty to take their inquiry higher in the management structure. Allegedly, supervisors at Wal-Mart stores routinely post the names and telephone numbers of corporate management, which employees are encouraged to use when seeking answers to their inquiries. Further, they are repeatedly told that there are no reprisals for utilizing the "open door" policy.

The Respondent contends that it has created a corporate atmosphere that makes it unlikely its employees will be interested in seeking union representation. It argues that because of the "open door" policy, employees find they do not need third-party representation. According to Wal-Mart, it is not anti-union, but rather "proassociate."[3]

It is the Respondent's contention that the filing of the representation petition at its Kingman, Arizona facility resulted not in its commission of unfair labor practices, but instead in an opportunity for the Employer to remind its employees of the benefits of the "open door" policy. The Respondent takes the position that the actions of its local, regional, and corporate officials, following the filing of the petition, were intended merely to explain to its employees why union representation was not in their best interest, and constituted a totally lawful expression of free speech. Further, it is the Respondent's position that the filing of the instant unfair labor practice charges is simply a continuation of a national campaign that the International Union has instituted in an effort to harm Wal-Mart.

The Respondent alleges that any changes in the operation of its Kingman facility, following the filing of the petition, were merely the result of the normal operation and maintenance of the store. It denies any attempt to unlawfully influence its employees' interest in supporting the Local Union. Any personnel actions taken were allegedly for legitimate business reasons, and unrelated to the union activity of the employees involved.

### *B. Background Facts*

The Respondent is the nations largest retail establishment, with well over 3000 stores located throughout the country. It is, of course, engaged in the business of the retail sale of consumer products and food items to the general public. Only one of its stores is directly involved in this dispute, namely store 2051 in Kingman, Arizona. This facility is divided into six different divisions, including a tire lube express (TLE) division. The TLE provides automotive services to customers including oil changes, and flat tire repair and tire balancing. It also sells merchandise directly to customers, including new tires. (GC Exh. 20.)

On August 28, 2000, the Local Union filed a petition with the Board in Case 28–RC–5889 to represent approximately 11 automotive service technicians employed at the facility's TLE. The Respondent took the position that an appropriate bargaining unit should consist of a storewide unit comprised of all its Kingman facility employees, approximately 260 individuals. Following a representation hearing, the Regional Director for Region 28 issued a Decision and Direction of Election on September 29, 2000, in which he found the appropriate unit to con-

[2] In its answer, the Respondent denies the allegations in the consolidated complaint regarding the filing and service of the various charges. However, at the hearing, counsel for the Respondent stipulated to the service of the charges as alleged. Further, the filing of the charges as alleged is established by the unrebutted admission into evidence of the original charges and docket letters for the above-captioned cases. See GC Exhs. 1(a), (h), (j), and (n).

[3] As part of its corporate image, Wal-Mart uniformly refers to its employees as "associates."

sist of all the facility's TLE employees. There were approximately 30 employees in the unit found appropriate. (GC Exh. 20.) Subsequently, an election was scheduled to be held on October 27, 2000, in the unit found appropriate. However, to date no election has been held as the present unfair labor practice charges served to block the election.

Following the filing of the representation petition, a copy of the petition was received by fax at the facility on August 28, 2000. On August 30, 2 days later, a team of labor relations managers from the Respondent's headquarters in Bentonville, Arkansas, arrived in Kingman to begin the Employer's election campaign. Initially, this team consisted of Vicky Dodson, senior labor manager; Kirk Williams, labor manager; Tim Scott, regional personnel manager; and others. Mike Buckner was the store manager at that time.

The Respondent does not deny the seriousness with which it takes union organizational efforts at any of its stores. All of its supervisors have computer access to a document entitled "A Managers Toolbox," which serves as a resource for managers in developing strategies for union avoidance. While the document states that the Respondent is "not antiunion" but, rather, "pro[a]ssociate," it also indicates that the managers are the "first line of defense against unionization." Managers are cautioned to be "alert for efforts by a union to organize" and are directed to call the "union hotline" when they become aware of union activity.[4] The document characterizes Wal-Mart as "strongly opposed to third party representation." It stresses, "maintaining an environment of open communication through the use of the Open Door Policy . . ." and states that this policy is the "greatest barrier to union influences" that will try to change the Respondent's "union free status." (GC Exh. 29.)

Vicky Dodson headed the team of labor relations managers from Arkansas (the Arkansas team). She acknowledged that the team's goal, in part, was to ensure that the Kingman facility remained union free. It is undisputed that the team managers, as well as other supervisors who came to the facility during the period prior to the scheduled election, had the intention of convincing the TLE employees to vote against union representation. Members of the team held numerous educational meetings with TLE employees and other store employees. They extensively discussed the Respondent's view of unions, the collective-bargaining process, and the Respondent's "open door" policy. Approximately five videos were shown to employees, all with the theme that the employees should reject "third-party representation." Additionally, a number of local, regional, and corporate managers, including the Respondent's chief executive officer, Tom Coughlin, meet with groups of employees, also with the intention of convincing them not to support the Local Union's organizing efforts.

The Arkansas team was also responsible for providing training to the Kingman facility managers, as well as to managers who arrived from other locations, on how to combat the Local Union's organizing efforts. It is undisputed that the team met daily with the facility manager and assistant managers in an effort to determine how the campaign was progressing. Further, members of the team had daily contact with the headquarters legal staff, usually in the form of a conference call, to bring the attorneys up to date on the status of the campaign, and to receive any legal guidance necessary.

At virtually every meeting held with groups of employees, the Respondent's managers stressed the "open door" policy. In resolving the unfair labor practice allegations in the complaint, it is essential to understand the Respondent's reliance on the policy and the way in which it was presented to the employees. References to the open door policy in material made available to employees can be accurately described as ubiquitous. Nationwide, the Respondent informs its employees of the open door policy through its computer-posted corporate policies known as the "pipeline" (GC Exh. 15) and in its employee handbook. (R. Exh. 12.) The handbook describes the open door policy as follows:

> Our Open Door Policy says that if you have an idea or a problem, you should go to your supervisor to talk about it without fear of retaliation. Faster resolution may occur when the associate goes through the immediate supervisor first. However, if the associate feels the supervisor is the source of the problem, or if the problem has not been addressed satisfactorily, the associate may go to any level of management in the Company. Remember, while the Open Door promises that you will be heard, it cannot promise that your opinion will always prevail. Any suppression of, or retaliation for using the Open Door Policy by a supervisory associate may result in disciplinary action, up to and including termination.

The computer-posted policy is very similar, indicating to employees that the purpose of the open door "is to bring your suggestions, observations, problems or concerns regarding the company or yourself to the attention of any supervisor."

Additionally, the open door policy is customarily posted at various points in the Respondent's stores nationwide where employees would likely congregate. It was undisputed that at the Kingman facility, the policy was posted in the training room, by the timeclock, in the breakroom, and in the TLE stockroom. (R. Exhs. 8–11.)

I am convinced that the open door policy is an integral part of the Respondent's corporate culture. It is also beyond doubt that the policy is intended, at least in part, to discourage employees from seeking union representation. The policy affords the Respondent the opportunity to tell its employees that "third-

[4] The "union hotline" is a system established so that managers throughout the country can report union activity to headquarters and, in return, receive guidance from labor relations specialists and legal advice from the Respondent's legal team, both in-house and outside counsel. The flow of information back to store managers is referred to as the "remedy system." During the hearing, I revoked certain portions of the subpoena duces tecum requested by counsel for the General Counsel and counsel for the Unions, which sought the production of hotline and remedy system documents. I ruled the remedy system documents privileged under the attorney-client privilege. However, in his posthearing brief, counsel for the General Counsel has requested that I reverse my previous ruling, order the production of the documents in question, and reopen the hearing for the introduction of these documents into evidence. This I decline to do. I am of the view that my original ruling was correct, and that the documents were not producible for the reasons that I stated at the hearing. Accordingly, I deny the General Counsel's request that I order the production of the documents in question.

party representation" is not necessary, as they are allegedly able to bring their concerns directly to management. While it is axiomatic that the Respondent may engage in union avoidance by expressing its negative views about unions to its employees, such expression must be without threat of reprisal, or force, or promise of benefit. (Sec. 8(c) of the Act.)

The central issue in this case is whether the Respondent's supervisors and agents crossed the line between free speech, and expressions or actions that would constitute violations of the Act. In the remainder of this decision, I will discuss the Respondent's conduct in connection with the union campaign and the union activity of certain of its employees.

### *C. Argument and Analysis*

#### 1. Promises to remedy grievances, and improve benefits and terms and conditions of employment

Complaint paragraph 5(b) alleges that the facility store manager, Mike Buckner, on August 30, 2000,[5] at a meeting with the TLE employees, promised improved benefits and terms and conditions of employment, as well as a remedy of employees' grievances, if they refrained from union organizational activity. This was the first meeting for employees held following the receipt of the representation petition. The Arkansas team had arrived in Kingman, and Vicky Dodson had assumed onsite control of the Respondent's campaign. Prior to the meeting, Dodson had met with Buckner and in preparation for his address to the TLE employees, she had written "talking points" for him to use. Buckner, Tim Scott, and Dodson all testified about the substance of this meeting. Kirk Williams testified that he was not at this meeting but, rather, was preparing for meetings that followed. Three former employees testified about the meeting, namely Greg Lewis, TLE service technician; Brad Jones, TLE service writer/greeter; and William Brooks, TLE service technician. All three employees had been active supporters of the Local Union. Of the three employee witnesses, Lewis' testimony is the only potentially damaging to the Respondent. According to Lewis, Buckner said that Wal-Mart had "dropped the ball" and that "he just let us know that if we had any problems, any questions, concerns or problems, to let him know, and he would take care of it." It is the General Counsel's contention that this statement, made in the context of certain longstanding complaints by the TLE employees, constituted a promise to remedy those complaints and generally to improve the terms and conditions of employment.

According to Buckner, he was given the "talking points" by Dodson, which he practiced delivering, and ultimately read to the assembled TLE employees. He denied making any other substantive comments at this meeting. A review of the "talking points" establishes that they were introductory remarks intended to inform the TLE employees of the filing of the representation petition, to introduce the members of the Arkansas team, and to indicate that other meetings would follow to more fully explain the union organization campaign and to keep the employees informed. (R. Exh. 7.) Both Scott and Dodson testified that Buckner read the talking points verbatim, and made no other substantive comments.

Vicky Dodson was a principal character in the events surrounding the union organizational campaign. She was in charge of the Respondent's onsite efforts to maintain the facility as a union-free store. It is, therefore, appropriate at the outset of this decision for me to make certain comments regarding her background and my impression of her credibility. At the time of her testimony, Dodson had been employed by Wal-Mart for 13 years and was classified as a director of labor relations. Previously, she had held positions with the Respondent as a senior labor manager and labor relations manager. Her testimony indicated extensive training as a labor relations professional, and the Respondent's confidence in her abilities was demonstrated by placing her in charge of its onsite campaign. Dodson testified for a lengthy period. Following her testimony, I am of the view that she is a well versed labor relations manager, who has a reasonably good understanding of how to conduct an election campaign on behalf of her Employer, without committing obvious unfair labor practices. Further, she impressed me with her sincerity, and no-nonsense attitude about her job. She is an intelligent individual with a good recall of events, and testified in detail without embellishment or exaggeration. I was impressed with her demeanor under both direct and cross-examination, and I found her to be a generally credible witness.

I credit the testimony of Dodson that on August 30, Buckner read the talking points verbatim. Further, I accept her testimony that Buckner did not ask TLE employees to tell him their problems, or that he would take care of their problems, or any words to that effect. Scott and Buckner support her testimony. Accordingly, I conclude that the General Counsel has failed to establish that Buckner made any unlawful promises to the TLE employees to remedy grievances or improve benefits and terms and conditions of employment.

However, I believe that it is still necessary to discuss the alleged promises in light of the open door policy. The General Counsel alleges repeated instances of various managers soliciting grievances or making promises of benefits in an effort to destroy the employees' support for the Local Union. According to the General Counsel, the Respondent has attempted to disguise these unlawful efforts by continuous references to the open door policy. To the contrary, I am of the view that this Employer has a longstanding and well-established past practice of encouraging its employees to seek out its managers and supervisors whenever they have questions, concerns, ideas, suggestions, and, yes, *problems*. That is the whole idea behind the open door policy. This is a nationwide program of long duration. As noted above, the Respondent advises its employees of the policy in numerous ways, including its employee handbook and computer-based "pipeline." Also, descriptions of the policy are posted throughout the Respondent's stores, frequently with the pictures and telephone numbers of its local, regional, and even corporate managers who are part of the open door. That was also the case at the Kingman facility, long before the organizational campaign commenced.

It is well established that "[a]n employer who has had a past practice and policy of soliciting employee grievances may continue to do so during an organizational campaign." *Naomi Knitting Plant,* 328 NLRB 1279 (1999), citing *House of Raeford*

[5] The following dates are all in 2000, unless otherwise indicated.

*Farms,* 308 NLRB 568, 569 (1992). Further, in the related area of objections to an election, the Board has held that an employer does not engage in objectionable conduct by soliciting and promising to remedy employee grievances during a union campaign if the employer, both prior to the campaign and after, was willing to listen to its employees' complaints and respond to them. *MacDonald Machinery Co.,* 335 NLRB 319 (2001); see also *Maple Grove Health Care Center,* 330 NLRB 775 (2000) ("Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy the grievances violates the Act.").

I disagree with the contention of counsel for the General Counsel and counsel for the Unions that the Respondent's use of the open door policy at the facility was inconsistent with its past practice. As I have stated, the policy was an integral part of the Respondent's corporate culture. Employees were continually exposed to the policy at all of its stores nationwide, including at the Kingman facility. Of course, during its election campaign, the Respondent held frequent meetings with employees. These meetings were conducted by various local, regional and corporate managers. Clearly, their intention was to convince the employees not to support the Local Union. As such, they argued that "third-party representation" was not necessary because the open door policy provided employees with a method of having their concerns directly addressed by management. This was the same message that the Respondent had previously used in explaining the alleged benefits of the open door policy. Nothing changed during the election campaign, except the frequency with which the employees heard this message, and the number and title of the messengers. The increased volume of "campaign propaganda" was certainly to be expected, as the Respondent was engaged in an election campaign. Also, it was not surprising that the Respondent brought high-ranking officials, including its chief executive officer, into the facility. The Respondent wanted its message to have the greatest impact possible. However, the message itself had not changed from that given prior to the Local Union's organizing efforts. The Respondent's reliance on the open door policy at the Kingman facility was not inconsistent with its past practice.

As noted above, I have concluded that Mike Buckner did not promise TLE employees on August 30 that he would remedy their grievances or improve their benefits and terms and conditions of employment. Further, I conclude that even assuming, for sake of argument, that Buckner made any comments regarding employee problems, they were made in the context of explaining the open door policy. This was merely a continuation of the Respondent's well-established past practice. Accordingly, I conclude there is insufficient evidence to establish the allegations in paragraph 5(b) of the complaint. Therefore, I shall recommend dismissal of this paragraph of the complaint.

Paragraph 5(c) of the complaint alleges that on August 30, Buckner, at a storewide meeting of employees, promised improved benefits and terms and conditions of employment, as well as a remedy of employees' grievances, if they refrained from union organizational activity. This complaint paragraph is identical to the prior paragraph, except the statements were allegedly made to a group of employees who worked throughout the Kingman facility, rather than only in the TLE. All parties agree that following the filing of the petition, the Respondent initially held campaign meetings for both TLE employees and for storewide groups of employees. The Respondent took the position at the representation hearing that the appropriate unit should be a storewide unit, not one comprised only of TLE employees. According to the Respondent, until the issue was decided, it thought it prudent to make its campaign presentation to all potential voters throughout the store. However, at some point following the Decision and Direction of Election, the Respondent limited its campaign meetings to only those employees in the TLE found by the Regional Director to be in the appropriate unit.

In any event, on August 30, a second meeting was held for employees, similar to the first, except that it was not limited to TLE employees. Former TLE employee Gregory Lewis, who attended both meetings, testified that the second meeting was "scripted," and Buckner made "pretty much verbatim" the same comments as at the earlier meeting. That was the only evidence offered to support the complaint allegation. On the other hand, Buckner, Dodson, and Williams all testified that Buckner read the same talking points he had at the earlier TLE meeting. Further, they all testified that he made no other substantive comments, and specifically did not promise the employees improved benefits and terms and conditions of employment, and did not promise to remedy employees' grievances. The three managers were essentially supported by the testimony of employees Dottie Yarnell, Dorothy Haddock, Sherri Quinn, and Sharon Ford.

For the reasons stated above, I continue to find Vicky Dodson to be a credible witness, and accept her version of the comments made by Buckner at the second meeting held on August 30. Further, the collective testimony of the witnesses weighs heavily in favor of the conclusion that Buckner did not promise employees improved benefits and terms and conditions of employment, or to remedy their grievances, and I so find.

Also, as I indicated above, even assuming, for argument sake, that Buckner made certain comments regarding employee problems, they were made in the context of explaining the open door policy. This was merely a continuation of the Respondent's well-established past practice. Such a restatement of the Respondent's preexisting open door policy would be lawful under existing Board law. *Naomi Knitting Plant,* supra; *House of Raeford Farms,* supra. Accordingly, I conclude the General Counsel has failed to meet his burden to establish the allegations in paragraph 5(c) of the complaint. Therefore, I shall recommend dismissal of this paragraph of the complaint.

It is alleged in paragraph 5(d) of the complaint that on August 30, Vicki Dodson solicited employee grievances and promised employees increased benefits and improved terms and conditions of employment if they refrained from supporting union organizational activity. Dodson spoke at both the TLE meeting and the storewide meeting held on the morning of August 30. Store Manager Buckner introduced her to employees at both meetings. TLE employee Jones testified that during the TLE meeting, Dodson said that she had come to the facility to talk and listen to the employees and, "to do whatever it takes to make things right." According to Jones, she stressed that the representation petition was a "serious business" and that the Employer stood behind the open door policy. Further, Jones contends that Dodson said that some employees had tried to use the policy in the past and that Wal-Mart had let them down, and that the Employer "had dropped the ball." Allegedly, she assured the employees that the Arkansas team was at the facility to "fix the problem," and that if they had any "problems," they should come to talk to herself, Kirk Williams, or Tim Scott. TLE employee Lewis supports some of Jones' testimony, as he contends that Dodson told the TLE employees that Wal-Mart "dropped the ball," and that if they had "any problems," to let her know and she would "do every thing within [her] power to take care of it." Also supporting certain of Jones' testimony was TLE employee Brooks. According to Brooks, Dodson informed the TLE employees that the Employer had "obviously dropped the ball," and that if employees had any "problems" or "concerns," they should come to her or a member of her team and she could "override that and get it straightened out." Allegedly, she said that she would do "anything in her power" to straighten things out.

Dodson testified that she said essentially the same thing to assembled employees at both the TLE and storewide meetings held on August 30. She told them that she was at the facility to train the managers about union organizational campaigns, and to ensure that they did not violate the law. Further, she would be educating the employees about unions and would be answering employee questions about unions and the campaign. She indicated that she would do anything she could to answer their questions. She talked about the open door policy. Dodson specifically denied telling employees that she would "make things right" or that she would "take care of, or straighten out problems." She did not tell employees that she was at the facility to "fix things" or any words to that effect. Dodson's testimony was essentially supported by the testimony of employees Dottie Yarnell, Dorothy Haddock, Sherri Quinn, and Sharron Ford. Also supporting Dodson's testimony were Store Manager Buckner and Labor Manager Williams. Williams, who only attended the storewide meeting on August 30, testified that Dodson spoke about why "third-party representation" was not necessary and about the open door policy. According to Williams, Dodson admitted that the Employer had made some mistakes, and that the open door had not always worked as designed. She also acknowledged that the leadership in the TLE had not been the best. However, he denied that Dodson made any statement about solving employee problems.

For the reasons stated above, I continue to believe that Vickie Dodson was a credible witness. Further, she impressed me as an intelligent, articulate, sophisticated individual who was a well-trained labor relations manager. She and her team were at the facility to run the Respondent's election campaign, and I simply do not believe that she would likely have committed obvious unfair labor practices. Her version of the events in question is inherently more plausible than the version of events as testified to by the witnesses called by the General Counsel. Also, the weight of the witness' testimony supports the position taken by Dodson. I believe it highly implausible that someone with Dodson's knowledge of labor relations would have told an assembled group of employees that she could solve their problems, or that they should bring their problems to her for resolution, or words to that effect. I think it much more likely that certain of the TLE employees simply misconstrued her statements and confused her comments about the open door policy, or her comment that she would obtain answers to their questions, with a promise to solve problems or improve benefits.

I am further of the view that any comments made by Dodson about the operation of the open door policy were consistent with the Respondent's well established and disseminated past practice, and, thus, lawful under existing Board law. (See the legal authority cited above.)

Accordingly, I conclude the General Counsel has failed to establish the allegations found in paragraph 5(d) of the complaint. Therefore, I shall recommend dismissal of this paragraph of the complaint.

Paragraph 5(f) of the complaint alleges that during the period from August 28 to October 24, Timothy Scott solicited employee grievances and complaints and promised employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity. As noted earlier, Scott was at the time a regional personnel manager who arrived at the facility on about August 30, as one of the members of the Respondent's Arkansas team. Preliminarily, it is important to establish that the unrebutted testimony of the Respondent's witnesses was that between September 17 and the first week in October, Scott was absent from the facility, having left to participate in an elk hunt. He was initially assigned to the TLE where he allegedly was to provide management support, as the TLE manager, Larry Eidson, was absent on medical leave. For approximately 9 days, Scott worked all day in the TLE. However, following the arrival of a new TLE district manager, Ragnar Guenther, who assumed the duties of an interim TLE manager, Scott was no longer assigned exclusively to the TLE. During the period that he functioned as TLE manager, Scott was in the TLE basically from open to close. He would perform the duties of the service technicians, including oil and tire changes, as well as organizing the work flow, taking care of customer complaints, preparing the stock room, and walking the floor. During his remaining period at the facility, Scott was assigned to assist the store with inventory preparation and open benefit enrollment, and to answer employee questions.

In any event, the only evidence offered by counsel for the General Counsel in support of this complaint allegation involved exclusively the period Scott worked in the TLE, which was approximately 9 days, beginning on August 30. Both employees Brooks and Lewis testified that while he was working in the TLE, Scott continually asked them if there was anything he could do for them, how they were doing, could he help them, and if they had any problems. On the other hand, Joe Bettinger, another TLE technician, testified that Scott never solicited grievances from him, nor did he hear Scott do so with anyone else. Scott himself denied that he ever solicited grievances, or used words that suggested he was promising to remedy issues, concerns or problems. Scott never addressed assembled groups of employees.

In a later section of this decision, I will address the issue of whether Scott's presence in the TLE for 9 days constituted surveillance of employees' union activity. However, it is clear to me that while at the TLE Scott performed a significant amount of service work and functioned as the acting TLE manager. In that capacity it would not be unusual for him to have asked TLE employees how they were doing, whether he could help them, or if they had any problems. These appear to me to be work-related questions regarding matters that the TLE manager should, of course, be concerned about. I do not believe that they constituted a solicitation of grievances.

Asking questions of TLE employees dealing with the daily operation of the shop was precisely what a manager should do. Further, the questions attributed to Scott were at best innocuous and ambiguous, appearing to be nothing more than a general inquiry about the operation of the TLE. The Board has held that vague statements that do not promise that anything in particular will happen do not rise to the level of illegal promises of benefits. *National Micronetics, Inc.,* 277 NLRB 993 (1985); citing *Allied/Egry Business Systems,* 169 NLRB 514, 517 (1968) (Asking the employees to give the plant manager a chance to prove they did not need an outsider to speak for them was merely a vague suggestion, which did not support a finding that the employer made an unlawful promise.). Accordingly, I conclude that the General Counsel has failed to meet his burden of proof regarding the allegations found in paragraph 5(f) of the complaint. Therefore, I shall recommend that this paragraph of the complaint be dismissed.

In paragraph 5(g) of the complaint, the General Counsel alleges that between August 28 and October 24, Dodson, Scott, and Williams solicited employee grievances and promised employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity. This paragraph appears to be a sort of "catch-all," by which the General Counsel charges the Respondent with continuing efforts to solicit grievances during the balance of what was the "preelection period," had an election been held. It is undisputed that during this period of time, the Respondent held numerous meetings with groups of employees, both exclusively for the employees in the TLE and for employees storewide. For the most part, these meetings were held daily and were conducted by Vicky Dodson and Kirk Williams. In some instances, management representatives besides Dodson and Williams made presentations to the assembled employees. The theme of all the meetings was basically the same, with management explaining the open door policy and why that policy allegedly made union representation unnecessary. At some meetings, videos were shown to employees, all containing the message that union representation was not in the employees' best interest. Employees were encouraged to ask questions and answers were generally provided.

Counsel for the General Counsel's witness Brad Jones testified that Dodson and Williams conducted meetings once or twice every day during the petition period. However, his only testimony, which might be construed as supporting this complaint allegation, was the comment that at these meetings Dodson and Williams listened to employees' questions and complaints and said, "[A]s far as things that were in their power, they did what they could to fix it." Another witness for the General Counsel, Gregory Lewis, testified that "everyone from Bentonville" went out of their way to ask if there was anything they could do for him, which he found "annoying." Further, he testified that during the group meetings Dodson and Williams asked employees if they had any questions, and specifically "if there were any problems that they could help us with."

Vicky Dodson denied asking employees to tell her their problems, asking if there were any problems she could help with, or telling employees that she was there to fix things, or do anything in her power to take care of their problems. She testified that she repeatedly told the employees that "third-party representation" was not necessary as they could speak for themselves through the open door policy. She acknowledged to the employees that Wal-Mart had "dropped the ball" with some prior open door complaints. Further, she told them that she would do everything in her power to answer their questions and provide them with the information they needed to make an informed decision about union representation. According to Dodson, she specifically told employees that Wal-Mart could not make promises and could not fix things because the law prohibited the Employer from making promises in an effort to influence how the employees voted.

Kirk Williams testified that he never asked employees if they had any problems, and never asked them to bring him their problems. He never told employees he would fix their problems if it were in his power. Further, he testified that he never heard any member of management make any such statement in his presence. He did, however, ask employees if they had any questions. Also, at the group meetings for employees, he frequently raised the open door policy and the Employer's position that the employees did not need a union to speak in their behalf.

Anthony Kuc, a former assistant manager at the Kingman facility, was called as a witness by counsel for the General Counsel. The Respondent terminated Kuc, and he indicated that he was considering legal action against the Respondent. However, despite some animosity towards the Respondent, he testified that during the petition period, he heard both Dodson and Williams tell employees in meetings that they could not promise them anything and could not fix anything. According to Kuc, Dodson and Williams scripted the daily meetings with employees, and they were careful about their choice of words. In addition to Kuc, the testimony of Dodson and Williams was essentially supported by employee Sherri Quinn, service technician Joe Bettinger, and former Store Manager Mike Buckner.

As I have previously, I continue to credit the testimony of Vicky Dodson. I also credit the testimony of Kirk Williams, another experienced labor relations professional. In my view, Dodson and Williams were unlikely to commit obvious unfair labor practices when making organized presentations to groups of employees. These were carefully controlled meetings, with management's presentation "scripted" in advance. Leaving nothing to chance, Dodson prepared "talking points" for management's use during the meetings. These written outlines support the Respondent's position that no solicitation of grievances or promises of benefits were made at these meetings by

Dodson, Williams, or Scott. (R. Exh. 15.) Perhaps the most compelling testimony came from former Assistant Manager Kuc. It was obvious from his testimony that he harbored considerable animosity towards the Respondent, which he felt terminated him unjustly. Nevertheless, his testimony was generally favorable to the Respondent when he indicated that during employee meetings he heard both Dodson and Williams say that they could neither promise nor fix anything.

The weight of the credible evidence clearly supports the denials of Dodson and Williams that anyone from management made any statements to employees that could be construed as either a solicitation of grievances or promise of benefit. However, even assuming, for the sake of argument, that management made some reference to employee problems, I continue to believe that such a comment was made in the context of explaining the open door policy and, as such, was consistent with the Respondent's past practice and well-disseminated policy. The comment would, thus, be lawful under existing Board law. *Naomi Knitting Plant,* supra; *House of Raeford Farms,* supra. Accordingly, I conclude the General Counsel has failed to establish the allegations set forth in paragraph 5(g) of the complaint. Therefore, I shall recommend that this paragraph of the complaint be dismissed.

Paragraph 5(h) of the complaint alleges that during the last week of September, Jim Wilhelm solicited employee grievances and complaints, and promised employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity. During September, Wilhelm was employed by the Respondent as a regional vice president of operations for an area that included the Kingman facility. At the time of the hearing, he was on a medical leave of absence and did not testify. In any event, it is undisputed that in September he traveled to Kingman to introduce a new district manager, Jay King. While at the facility, he met with a storewide group of employees.

Former TLE employee Jones testified that he was present when Wilhelm addressed the employees. According to Jones, Wilhelm said that he believed in the open door policy and if it had not worked properly because the employees in the TLE had been having a "bad time," it was his fault, as he had "dropped the ball." Allegedly, Wilhelm said that past problems could be "fixed." Jones indicated that he had tried to use the open door to complain about an issue when he called David Dible (executive vice president of specialty divisions), who merely gave him the "company line." Wilhelm asked Jones why he did not contact him, and Jones indicated he had gone as far as he thought he could. According to Jones, Wilhelm indicated that he was part of the open door too, that his picture was in the breakroom with his telephone number, and if the employees had any questions or concerns that they should not hesitate to call him. Jones acknowledged in his testimony that the open door policy poster with Wilhelm's picture and phone number had been on the wall for months prior to the filing of the petition. Russell Harrell, a former department manager, was called as a witness by counsel for the General Counsel. At the time of the hearing, he was no longer employed by the Respondent. He supported Jones' testimony to the extent that he indicated Wilhelm stated that employees who had problems to discuss could pursue the open door policy and have their concerns addressed. Further, Wilhelm told the employees if they felt "they weren't being taken care of, call him."

Dodson testified that Wilhelm introduced the new district manager, Jay King, after which he talked about the open door policy. He reminded the employees that he was a part of the open door and pointed out that his picture, in connection with the open door, was posted in the breakroom. In a discussion with employees Jones or Brooks about whether the open door worked, Wilhelm indicated that they had not called him. According to Dodson, Wilhelm did not say that he would fix their problems, or any words to that effect. Kirk Williams testified largely in conformity with Dodson. However, he added that in Wilhelm's address to the employees, Wilhelm indicated that with the open door policy they would get an answer to their inquiry, although it might not be the answer they wanted. Wilhelm told the employees that he receives phone calls from employees all over his region in connection with the open door policy and reminded them that his picture and phone number were in the breakroom. Williams denied that Wilhelm ever said anything about resolving employee problems. District Manager Jay King and employee Dorothy Haddock essentially testified in conformity with Dodson and Williams.

There was really not a great disparity between the testimony of the various witnesses regarding the address Wilhelm made to the employees. Everyone agrees that Wilhelm talked about the open door policy and his role in the process. Further, it is clear that he reminded the employees that his picture and phone number were posted as part of the open door. Wilhelm also had a discussion with Jones about the value of the open door. The only dispute regarding the substance of Wilhelm's comments was whether he said that employee problems could be "fixed" through the open door process.

Based on the weight of the probative evidence, I am of the view that it is unlikely that Wilhelm made any comment about fixing employee problems, or words to that effect. I continue to find Vicky Dodson to be a particularly reliable and credible witness. Further, I find the testimony of Kirk Williams and Jay King regarding this matter to be equally credible. On the other hand, these were comments that Jones and Harrell could have easily misconstrued, and I find their testimony to be inherently less plausible. Therefore, I do not believe that Wilhelm referenced fixing employee problems. However, even assuming, for the sake of argument, that there were references made to solving problems in connection with the open door policy, I do not believe any such comment violated the Act. As I have repeatedly indicated, the Respondent's reliance on the open door policy and its use of the policy in union avoidance was part of the Respondent's well established corporate culture. Any mention of problem solving by Wilhelm in connection with the policy was in conformity with the Respondent's past practice. (See legal authority cited above.) Accordingly, I find that the General Counsel has failed to meet his burden of proof to establish the allegations set forth in paragraph 5(h) of the complaint. Therefore, I shall recommend dismissal of this paragraph of the complaint.

Tom Coughlin was the president and CEO of the Respondent at the time of the events in question. It is alleged in paragraph

5(k) of the complaint that in mid-October, he solicited employee grievances and complaints, and promised employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity. Three of the General Counsel's witnesses, Jones, Lewis, and Brooks, testified in a fairly similar fashion concerning a presentation that Coughlin made to assembled TLE employees. All three agree that Coughlin said that because of certain legal requirements associated with the filing of the petition, he would not be able to answer any employee questions. However, Coughlin presented the Respondent's position that because of the open door policy, it was unnecessary for the employees to seek union representation. It is also undisputed that Coughlin indicated that he was a part of the open door, and he wrote his telephone number on the erasable board and directed Jay King not to let anyone remove the number.

Jones testified that Coughlin said the Respondent had let the TLE employees down. Further, he allegedly said, "If you have any questions or problems, don't hesitate to call me, and I will get you some results." According to Jones, Coughlin asked about the store manager, if he was doing his job, and whether the employees had confidence in him. Lewis testified that Coughlin said he "would do anything he could to take care of them," . . . "was over everyone, that he was the man that could get things done," . . . "he would get us taken care of." According to Brooks, Coughlin said, "[I]f we had any concerns, we can call him," and also said, "I can override anybody." Coughlin asked the employees how Store Manager Buckner was doing.

Jay King testified that Coughlin had come to the Kingman facility at the request of King and Vicky Dodson to reassure the TLE employees, who were apparently concerned about losing their jobs. According to King, Coughlin started the meeting by assuring the employees that they would not be retaliated against because they supported the Local Union. He then spoke about the open door policy and his belief that the employees did not need third-party representation. He indicated that he was a part of the open door, wrote his phone number on a board, and directed King not to let anyone erase it. Coughlin said that if they could not get answers to concerns locally or regionally, to call him and he would get them an answer. Dodson essentially supported King's version of this meeting, adding that Coughlin asked the employees how Store Manager Buckner was doing. Also, according to Dodson, in describing the open door policy, Coughlin indicated that employees who used the open door might not get the answer they wanted, but they would always get an answer. Larry Eidson, who at the time was the TLE manager, also testified essentially as had King and Dodson. It is important to note that King, Dodson, and Eidson all denied that Coughlin had said anything about fixing employee problems, or that he could do anything that he wanted in the store, or words to that effect.

Joe Bettinger, service technician, was present for Coughlin's presentation and testified as a witness on behalf of the Respondent. His testimony supported the other witnesses called by the Respondent. Further, he made it clear that he did "not at all" get the impression that Coughlin was offering to fix employee problems, nor did Coughlin make any reference to being able to do anything he pleased in the store.

The only other witness who testified that he was present for Coughlin's remarks was James Osterhout, a service technician. Osterhout, who gave an affidavit to the Board during the investigation of the unfair labor practice charges in this case, was called as a witness by counsel for the General Counsel. He testified for an extensive period of time and was closely cross-examined by counsel for the Respondent. Ultimately, Osterhout admitted that he lied in his affidavit regarding what was clearly a material fact, as it was the principal support for the allegation in complaint paragraph 5(j). The General Counsel later withdrew this complaint allegation. In any event, based on his admission that he lied to a Board agent when giving an affidavit under oath, I conclude that he is incredible for all purposes. Therefore, I shall give his testimony no weight what so ever.

The parties stipulated at the hearing that Coughlin visited the Kingman facility on October 9, 2000. Robert Hey, Coughlin's chief operations assistant, testified that Coughlin travels to 100 to 150 of the Respondent's stores every year. Hey generally travels with Coughlin, and has been doing so for the past 7 years, although he did not make the trip to Kingman on October 9. Hey testified that he has observed Coughlin's past practice of meeting with employees, where he typically asks how the management team is treating them, discusses the open door policy, hands out his phone number, and invites the employees to bring their questions, comments, concerns, and problems to him if they are not addressed at a lower level. Hey testified that he has been present when Coughlin addresses separate groups of employees, but he could not recall whether he had ever observed Coughlin addressing a separate group of TLE employees.

Obviously, the parties dispute the substance of Coughlin's remarks, just as they have disputed the substance of other managers' remarks. Vicky Dodson testified that just prior to the TLE meeting, she met with Coughlin, supplied him with "talking points," which she had prepared, and cautioned him to be careful what he said because of the possible legal ramifications. As I have noted before, I find Dodson to be a careful, experienced labor relations manager. My review of the talking points, which she prepared for Coughlin, indicates that the prepared document did not cross the line between free speech under Section 8(c) of the Act, and an illegal solicitation of grievances or promise of benefit. (R. Exh. 17.) While there is no contention that Coughlin read the prepared document verbatim, I continue to find Dodson to be credible, and I accept her testimony that Coughlin did not tell employees that he would fix their problems, or that he would do anything he could to take care of them, or words to that effect. Her testimony is similar to that of King, Bettinger, and Eidson. On the other hand, I can certainly understand how employees Jones, Lewis, and Brooks, who were meeting the Respondent's CEO, could have easily given his statements greater force or authority than was intended, or spoken. Undoubtedly, they assumed that the Respondent's "head man" could do, for the most part, whatever he wanted to do.

Once again, it is important to consider the Respondent's past practice. Hey testified that in the 7 years that he had been accompanying Coughlin on his visits to stores, they had appeared at approximately 700 stores, where Coughlin had met with groups of employees. The Respondent does not contend that Coughlin's appearance at Kingman was just a coincidence. To the contrary, it is clear he came to the facility to meet with the TLE employees and try to convince them not to support the Local Union. This was certainly not illegal, nor would it be illegal for him to talk about the open door policy. This went to the "heart" of the Respondent's corporate culture. Even assuming, for the sake of this discussion, that in the course of talking about the open door, Coughlin mentioned employees taking their problems to management, including himself, this was nothing more than another recitation of the Respondent's well-established past practice. As I have said before, under existing Board law, this is not a violation of the Act. (*Naomi Knitting Plant,* supra; *House of Raeford Farms,* supra.)

It seems fairly obvious that the Respondent anticipated that the appearance of the CEO would impress the TLE employees and encourage them to vote against union representation. However, bringing out the "big guns" did not cause the words spoken to become unlawful. Nor did the words suddenly change their meaning, especially when the words spoken have to do with the open door policy, which is repeated on a local, regional, and corporate level at every opportunity. Coughlin is apparently an ambassador for that policy wherever he goes, including to Kingman. Accordingly, I conclude that by Coughlin's remarks of October 9, the Respondent did not solicit employee grievances or promise its employees increased benefits as alleged in paragraph 5(k) of the complaint. Therefore, I shall recommend that this paragraph of the complaint be dismissed.

Paragraph 5(m)(1) of the complaint alleges that in mid-October 2000, Jay King solicited employee grievances and promised employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity. However, I am uncertain specifically at what event King is alleged to have engaged in this conduct. There is really no evidence offered by the General Counsel as would support this allegation. At best, I must assume the complaint allegation is making reference to the meeting for the TLE employees where Coughlin appeared. District Manager Jay King accompanied him.

According to former employee Brad Jones, the TLE employees were "disappointed" by Coughlin's refusal to answer employee questions. Apparently, King remained with the employees after Coughlin left and attempted to answer certain questions. Former employee William Brooks testified that King said, "There are some issues here obviously and that we can't change what's happened in the past. We'll start fresh and work forward from here." It was the testimony of former employee Gregory Lewis that the employees began to ask King questions, at which point "it began to get a little heated." Allegedly, questions would be asked, but King would "go around them. He wouldn't give us direct answers."

The undersigned is at a loss to understand how any of these statements by King could be construed as a solicitation of employee grievances or a promise of benefit. I conclude that there is insufficient evidence to establish the allegations set forth in paragraph 5(m)(1) of the complaint. Therefore, I shall recommend that this paragraph of the complaint be dismissed.

2. Surveillance of employees' union activity

The General Counsel alleges that throughout the period prior to the scheduled election, and even beyond, the Respondent engaged in conduct that constituted surveillance, or gave employees the impression that their union activities were under surveillance. Specifically, paragraph 5(e) of the complaint alleges that during the period from August 28 to about September 30, Timothy Scott engaged in surveillance. As is noted above, Scott, who at the time was a regional personnel manager, arrived in Kingman on approximately August 30 as part of the Arkansas labor relations team. The evidence clearly establishes that their primary purpose at the facility was to dissuade employees from supporting the Local Union.

At the time the petition was filed, the TLE manager, Larry Eidson, was on a medical leave of absence. Scott was assigned by Vicky Dodson to work in the TLE as the interim TLE manager, although he apparently had no prior experience working in a TLE. He remained in the TLE for approximately the next 9 days, working from the time the shop was open, until it closed. He worked side by side with the TLE employees, waiting on customers, changing oil and tires, helping with stocking, walking the floor, scheduling, and "observing." There is no question that he was actively engaged in observing the TLE employees. All of the Respondent's managers present at the facility, including local, regional, and those from corporate headquarters, were expected to gather information regarding the employees' union sympathies and activities.

The Respondent had created an elaborate system for obtaining this information. The Arkansas team held daily morning meetings with the local managers. Managers were instructed to obtain information about what the employees wanted and to learn employees' union sympathies. They were to gather this information and record it on index cards. (GC Exh. 38.) The information reported to the Arkansas team by the local managers would be reviewed during the morning managers' meetings. It is fairly obvious from a review of the cards and the record as a whole, that through this system the Respondent was able to learn which employees in the TLE were supporting the Local Union, and some of the issues that motivated employees to seek union representation. The Respondent's system for obtaining this information was explained in detail by Anthony Kuc, a former assistant manager at the facility. The Respondent ultimately fired Kuc, and he is considering legal action for alleged wrongful discharge. While it is clear to me that Kuc harbors considerable animosity towards the Respondent, I believe he testified truthfully. In some instances his testimony was helpful to the Respondent, and his testimony appeared to be genuine, without exaggeration or embellishment. In any event, his description of the Respondent's information gathering system is, for the most part, acknowledged by the testimony of both Vicky Dodson and Kirk Williams.

During the period that Scott was present in the TLE, the Respondent was taking the position that any appropriate bargaining unit should be comprised of all its Kingman store employees. However, the petitioned for unit was only comprised of the TLE automotive service technicians, and, of course, the Respondent understood that it was in the TLE that the union organizational activity was centered. It is important to note that the petitioned for unit was comprised of a relatively small number of employees, exactly 11. There were an additional 19 employees in the TLE, and a total of 260 employees employed storewide at the Kingman facility. (GC Exh. 20.) Yet, despite the small number of employees in the TLE, the Respondent decided to station Scott there full time for the first 9 days that he was at the facility.

Scott's presence in the TLE must have had a significant impression on the automotive service technicians. Here was a regional personnel manager, who had arrived immediately after the filing of the petition in the company of other labor relations managers. Despite his lack of experience working in a TLE, he was assigned to function as their interim manager. Not only was he physically present all day long in the TLE, but, as testified to by a number of the technicians, he frequently engaged them in conversation about the operation of the TLE.[6] The natural impact of Scott's presence on the technicians would have been to hinder their union activity.

The Respondent argues that Scott was doing nothing more than functioning as the interim TLE manager, and that his actions were consistent with that position. While it may be accurate to describe the duties he was performing as consistent with that of an interim manager, the employees were obviously aware that his lack of experience made him unqualified for that position. They would have reasonably assumed that as a regional personnel manager, his presence in the TLE was primarily intended to observe whether they were engaged in union activity. This could only have had the intended result of "chilling" their union activity.

In dismissing a complaint, the Board has held that management may observe public union activity on its premises without violating Section 8(a)(1) of the Act, unless management "officials do something out of the ordinary." *Metal Industries,* 251 NLRB 1523 (1980). Acting out of the ordinary was exactly what the Respondent was doing when it placed Scott in the TLE as interim manager. I believe that the facts establish that his primary purpose in being physically present in the TLE was to gather information about the employees' union activity. The Respondent does not dispute that its information collection system was designed to do just that. Scott's constant presence in the TLE for 9 consecutive workdays was certainly meant to, not very subtly, dissuade the employees from engaging in union activity. The Board has concluded that in determining whether a respondent has created an impression of surveillance, the test is whether employees would reasonably assume from the action in question that their union activities have been placed under surveillance. *Waste Stream Management,* 315 NLRB 1099, 1124 (1994). In my view, the TLE employees would certainly have reasonably assumed by Scott's presence that management was attempting to observe their union activities. Former employees Jones, Lewis, and Brooks testified as much.

Based on the above, I conclude that from August 30, for approximately the next 9 days, the Respondent, by Timothy Scott, engaged in surveillance of its employees' union activities, and gave its employees that impression. This conduct, as alleged in paragraph 5(e) of the complaint, had a chilling effect on the employees Section 7 rights and, therefore, constituted a violation of Section 8(a)(1) of the Act.

It is alleged in complaint paragraphs 5(p)(1) and (2) that in mid-October 2000, the Respondent, by Jim Winkler, engaged in the surveillance of employees' union activity, or created an impression among its employees that their union activity was under surveillance. Preliminarily, it should be noted that the Respondent operates a snack bar at the Kingman facility known as the Radio Grill. It is open to the public and to all employees, including managers. Winkler testified that he arrived in Kingman as the store manager on October 17, having replaced Mike Buckner. According to Winkler, on his third or fourth day in Kingman, he went to the Radio Grill at about noon to eat lunch.

Brad Jones testified that he, Will Brooks, and Greg Lewis were sitting in the Radio Grill at lunchtime discussing what they would do that night regarding the union campaign. The three men were "off the clock" at the time. According to Jones, Winkler walked in and asked how they were doing. Lewis allegedly responded, "Oh, we're just having a little union meeting." Winkler did not respond, but simply bought a hot dog, and sat down in a seat located in the next booth, a distance of "two to three feet." Jones testified that there were open booths, which were not as close to the three men as the one Winkler chose. Will Brooks' testimony was similar, with one important difference. He indicated that after Lewis told Winkler that the men were having a union meeting, Lewis added, "Oh, we're just kidding." Also, according to Brooks, employee Everett Ford was sitting with the men discussing the union campaign when Winkler entered the Radio Grill.

Winkler testified that during the year he worked in the Kingman facility, that he ate in the Radio Grill approximately three or four times a week. Apparently, he was particularly fond of the "corn dogs" served in the snack bar. In any event, on the day in question, he entered the Radio Grill, went directly to the counter, placed his order, received his food, stopped at the condiment counter, and then sat down. He claims there were 20–25 people in the Radio Grill at the time, and he estimates he sat approximately 10 to 12 feet from the employees, who he recalls as Jones, Brooks, and Lewis. Winkler testified there was no particular reason why he selected the seat he did. After he began to eat, Lewis said to him, "Hi, Jim. We're just having a union meeting. Just kidding." As Winkler was chewing, he responded with a facial expression and did not speak. He never spoke to Lewis about the comment, and never heard about it again until he learned litigation was pending. Winkler testified that there was nothing unusual about managers eating in the Radio Grill. Employees Dottie Yarnell, Dorothy Haddock, and Sherri Quinn also testified that they had frequently seen Winkler eating in the Radio Grill during the period of time that he worked in Kingman.

[6] Since Scott was performing the duties of the interim TLE manager, his practice of engaging the employees in conversation about the operation of the TLE would not by itself constitute a solicitation of grievances, or promise of benefit.

There was considerable conflict at the hearing as to precisely where Winkler sat in the Radio Grill on the day in question, and his proximity to the union supporters. Photographs of the restaurant were marked with symbols to represent the placement of the people involved. (R. Exhs. 18, 19.) However, in my view the exact distance between Winkler and the employees is really insignificant. What is of much greater importance is the undisputed fact that the Radio Grill is an area open to everyone, employees, managers, and the public. As a general proposition, the Board has held that an employer does not violate the Act by observing union activity that takes place in the employer's facility in plain sight. In finding that a supervisor's presence in a break room was not unlawful surveillance, the Board held that, "when protected activity is conducted in such a public area, to be unlawful, the alleged surveillance must be something other than the result of 'fortuitous' circumstances and must involve suspicious behavior or untoward conduct." *Nicholas County Health Care Center,* 331 NLRB 970 (2000). Further, the Board has found that a prohibition against surveillance does not prevent employers from observing public union activity, particularly when it occurs on company premises, as long as the employer does not engage in conduct that is so "out of the ordinary" that it creates the impression of surveillance. *Parsippany Hotel Management Co.,* 319 NLRB 114, 126 (1995); also see *Southern Maryland Hospital Center,* 293 NLRB 1209, 1217 (1989); and *Metal Industries,* supra.

Jones, Lewis, and Brooks were sitting in the Respondent's snack bar, presumably discussing the union campaign, although Lewis told Winkler that his reference to a "union meeting" was only a joke. In any event, Winkler had a legitimate basis for being in the Radio Grill, namely obtaining lunch during his lunch period. The employees should certainly not have been surprised to see him, as the Radio Grill was open to all employees, as well as the general public. There was nothing suspicious about Winkler's action in obtaining lunch, and certainly nothing "out of the ordinary." In a similar case, the Board has held that a supervisor's presence in a lunchroom, after she had finished lunch, but while the employees were discussing the union, did not constitute unlawful surveillance. *Rosewood Mfg. Co.,* 269 NLRB 782, 784 (1984). While Winkler was new to the facility and had not yet established his custom of dinning on corn dogs in the snack bar, the employees must have understood that this was a "public place," with customers and managers frequently present, and, therefore, they should not have had a expectation of privacy.

As I have indicated above, the Respondent's managers were expected to report on any union activity that they observed. Certainly, Winkler would have been under similar instructions. Nevertheless, he was still free to utilize the Respondent's public area, the snack bar, to have his lunch. In that respect his presence in the Radio Grill was "fortuitous," and not illegal. While one may safely assume that Winkler reported back to the Arkansas labor relations team what he observed in the snack bar, the three employees should have reasonably understood that they were likely to be without privacy in such a "public place." Accordingly, I conclude that the General Counsel has failed to establish that Winkler engaged in surveillance or created an impression among the employees that their union activities were under surveillance when he had lunch in the Radio Grill. Therefore, I shall recommend that paragraphs 5(p)(1) and (2) of the complaint be dismissed.

It is alleged in complaint paragraphs 5(v)(1) and (2) that during the period from about mid-February to mid-March 2002, Jeff Van Horn, store manager, "Guenther Ragner," TLE regional manager, and John Pace, assistant store manager, engaged in surveillance and created an impression among employees that their union activities were under surveillance. The only direct evidence offered by counsel for the General Counsel to support this allegation was the testimony of former employee Larry Adams. He testified that on approximately February 12, 2002, he began to wear a small "union badge" with the letters UFCW on it. Thereafter, until about mid-March, Adams claims that a number of managers put on TLE uniforms and began to perform work in the shop. Specifically, he named Van Horn, Don, an assistant manager (no last name given), and Guenther. These managers allegedly worked in the TLE "pretty regular" during this period, which Adams testified was "really rare."

Counsel for the General Counsel argues that this was merely a continuation of the Respondent's on going efforts to observe and report on its employees' union activities. In supporting its allegations of surveillance, counsel places heavy reliance on directives and resources made available to managers in a document known as the "manager's toolbox." (GC Exh. 29.) The document, which is made available to managers nationwide, does set forth a rather elaborate procedure for reporting union activity among the Respondent's employees. They are directed to report detailed information about who did what, when, and where. It is clear that this is intended as an important element in the Respondent's corporatewide efforts towards union avoidance. The Respondent did not deny that it made an effort at the Kingman facility to gather information regarding the union organizing activities of its employees, with Vicky Dodson and Kirk Williams admitting as much. However, the Respondent argues that there is nothing illegal about gathering information that comes into the possession of its managers while they go about their normal job duties and responsibilities at the facility, as long as they do nothing "out of the ordinary," as would create an impression of surveillance.

Regarding this specific complaint allegation, former TLE Manager Mike Wade testified that when he became the manager in January 2002, the TLE was under staffed by five employees. He claims that he mentioned it to Store Manager Van Horn daily until the matter was resolved. While waiting for hiring to correct the short staffing, the store manager, and a number of assistant managers, including John Pace, came into the TLE to help out. They remained as long as Wade needed them, usually most of the day. Van Horn testified in support of Wade. According to Van Horn, he and Pace helped out the most because they had prior automotive experience. Additionally, other members of management helped out as needed. Both Wade and Van Horn deny that they were aware of any union activity being conducted at that time.

Ragnar Guenther, the TLE district manager, testified that he first assumed that position for the nine-store area, including the Kingman facility, in September 2000. At that time, Tim Scott was functioning as the interim TLE manager. Guenther assumed the role of acting TLE manager at the facility, allowing Scott to be assigned other duties. In any event, Guenther testified that during February and March 2002, he was present in the Kingman facility approximately once a week. According to Guenther, he did not increase his time in the TLE during this period, nor did he vary his routine. He continued to tour the shop and to help out whenever needed. Guenther denied observing any union activity during this period.

In my view, the evidence offered by counsel for the General Counsel to establish this allegation is insufficient. There was credible evidence in the form of the testimony of Wade, Van Horn, and Guenther that the TLE was significantly understaffed during early 2002. It would certainly have been reasonable for the Respondent to have utilized its managers to temporarily correct this deficiency, while hiring was conducted to solve the problem. Apparently, Van Horn, Pace, and Guenther all had automotive experience, with Guenther having previous experience working in several TLE shops. Adams' testimony that this use of the managers was unusual is simply not credible. There was evidence offered throughout the hearing that managers were used in the store wherever the need arose. I would certainly expect that with a shortage of TLE employees, the managers would be used to fill in. As this was not out of the ordinary, the managers' presence in the TLE would not constitute surveillance or create the impression of surveillance.[7] Further, the TLE was a work area where customers, employees, and managers all had a need to congregate. The employees would not have had a reasonable expectation of privacy in such a "public area." As has been noted above, the Board has held that an employer does not violate the Act by observing union activity in a public location unless the employer does something unusual or out of the ordinary. *Parsippany Hotel Management,* supra; *Southern Maryland Hospital Center,* supra; and *Metal Industries,* supra.

Based on the above, I conclude that the General Counsel has failed to meet his evidentiary burden, and has failed to establish the allegations set forth in complaint paragraphs 5(v)(1) and (2) by a preponderance of the evidence. Therefore, I shall recommend that this paragraph of the complaint be dismissed.

### 3. Granting benefits and improving working conditions

It is alleged in complaint paragraphs 5(i)(1) through (6) that beginning on about August 28, 2000, the Respondent granted employees in the TLE a number of benefits and improved their working conditions, all in an effort to unlawfully convince them to refrain from supporting the Local Union. Much of the General Counsel's case is premised on the theory that working conditions had deteriorated in the TLE to the point where the employees had a number of significant unresolved complaints and grievances. These were the issues that had allegedly induced the employees to seek union representation. It is the contention of the General Counsel that by correcting the problems and addressing these complaints after the petition was filed, that the Respondent was interfering in the exercise of its employees Section 7 rights.

Preliminarily, it is important to note the chronological order in which various TLE managers served in that position. Larry Eidson was the manager for the period prior to the filing of the petition, and went on a medical leave of absence from July 2000 to the end of September 2000. Hillary Vergara filled the position on an interim basis, until her transfer to the Las Vegas store on August 26. The next person to hold the position, also on an interim basis, was Tim Scott, who filled in from approximately August 30, for the next 9 days. He was replaced by Ragnar Guenther, the new TLE district manager, who acted as interim manager at the Kingman TLE. Eidson returned from his leave of absence in late September, however, because of health issues he continued to miss a significant amount of work, and Guenther was required to fill in as necessary.

Under existing Board law, there is an inference that benefits granted employees during a petition period are coercive. *Lampi, L.L.C.,* 322 NLRB 502, 502 (1996). An employer can rebut that inference by coming forward with an explanation, other than the pending election, for the timing of the grant of benefits. *Uarco, Inc.,* 216 NLRB 1, 2 (1974); see also *United Airlines Services Corp.,* 290 NLRB 954, 954 (1988) ("The critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect."). The same test is applied in unfair labor practice cases as in representation cases. See *Holly Farms, Corp.,* 311 NLRB 273, 274 (1993); and *Speco Corp.,* 298 NLRB 439 fn. 2 (1990).

*Preferred scheduling system:* It is alleged in subparagraph 5(i)(1) of the complaint that the Respondent suspended the full implementation of the preferred scheduling system. As testified to by Tim Scott, the preferred scheduling system was the Respondent's attempt to develop a computer generated scheduling system that would automatically generate a work schedule based on matching the employees' availability with the expected volume of customer business.

Historically, the TLE employees' work schedules had been prepared manually by the TLE manager, using as a basis only employee availability and the hours the shop was open. Brad Jones testified that prior to the filing of the petition, while Hillary Vergara was acting for TLE Manager Eidson, he was asked to fill out a new associate scheduling form. Jones was encouraged to indicate that he was available to work 7 days a week. Vergara informed him that under the new system, known as "preferred scheduling," that the computer would decide the schedule. Jones, who had always worked a traditional 40-hour workweek, Monday through Friday, refused to adjust his schedule. He was directed to see Carlos Abi-Rachad, who at the time was the TLE district manager. Abi-Rachad advised Jones to be a "team player," and both Abi-Rachad and Vergara explained that preferred scheduling was a company-

[7] I believe that this situation was fundamentally different from what was reflected in Tim Scott's constant presence in the TLE for 9 days straight in early September 2000. Scott, who had no automotive experience, was a member of the Respondent's Arkansas labor relations team, which had just arrived at the facility in response to the petition. The TLE employees had every reason to view Scott's presence in the shop as grossly out of the ordinary, and likely in direct response to the filing of the petition. In the case of Scott, the evidence points strongly to his physical presence in the TLE being primarily for the purpose of surveillance, and it would certainly tend to leave that impression with the employees.

wide program and that other stores were already using it. Jones then used the open door policy to complain to David Dible at corporate headquarters, who also told him the Employer was moving to preferred scheduling. Finally, Jones was visited by regional TLE manager, Shawn Kaiser, who also told Jones that Wal-Mart was going to preferred scheduling and Jones should be a "team player."

Jones testified that although prior to the petition no manager ever informed him that the preferred scheduling system had been abandoned, in fact the system was never implemented and he never lost any hours of work. Will Brooks testified that in mid-July the computer generated scheduling resulted in his being scheduled for between 8 and 16 hours of work a week. He complained to Abi-Rachad and Shawn Kaiser, TLE regional manager, and was allegedly told that preferred scheduling was the way the Employer was going. However, he also acknowledged that the system was never actually implemented. Both Jones and Brooks indicated that the schedules generated by Vergara using the computer system were never actually used. Instead, the TLE manager would manually write the old schedule over the computer-generated schedule. It was the old schedule that the employees continued to work from prior to the filing of the petition, through the petition period and, apparently, to the present time.

Joe Bettinger testified that Vergara's use of the computer for scheduling was a "disaster." It created schedules that were totally unworkable in view of the limited and disjointed hours it scheduled employees to work. He agreed with Jones and Brooks that no one ever worked the schedule the preferred system printed. According to Bettinger, Vergara changed the computer-generated schedule by hand back to the normal schedule, and she abandoned the effort to have employees work the preferred schedule some 2 or 3 weeks *prior* to the filing of the petition. Typically, schedules are posted on a board in the TLE 3 weeks prior to the date the work is to be performed.

Store Manager Mike Buckner testified that no TLE employee ever worked the schedule generated by the preferred scheduling computer program. According to Buckner, Jones complained to him about the system a couple of weeks before the petition was filed. He allegedly told Vergara to stop trying to use it, and she did so, all *prior* to the filing of the petition. This testimony was supported by Tim Scott, who testified that when he got to the facility, a day or two after the petition was filed, the computer-generated schedules had already been changed by hand. The handwritten changes were reflected on the schedules posted by the timeclock. He was approached by Brooks, who complained that Vergara had printed the computer-generated schedule with poor results. Although Brooks told Scott that he had not worked the preferred scheduling hours, he was still worried about it. Scott testified that while he was in the TLE, the preferred schedule was never worked by any employee.

Both the General Counsel (GC Exhs. 42, 43) and the Respondent (R. Exh. 26) offered TLE schedules, which were somewhat different, in an effort to support their respective positions as to whether the preferred scheduling system was, or was not, abandoned prior to the filing of the representation petition. In my opinion, this issue is "much ado about nothing."[8] The underlying facts are really not in dispute. All witnessed who testified about this matter agreed that no TLE employee ever worked a schedule generated by the preferred scheduling system. No one lost even an hour of work as a result of the computer-generated schedules. It also seems clear to me that Hillary Vergara's attempt to use this system was abandoned *prior* to the filing of the petition. Buckner so testified, and I find no reason to doubt this testimony. In this respect, he seems credible. Also, his testimony is supported by that of Bettinger and Scott, and by the fact that Vergara was transferred to the Las Vegas store on August 26, 2 days before the petition was filed. She was, after all, the manager who had tried to implement the program.

As the attempt to use the preferred scheduling system had, for all practical purposes, been abandoned *prior* to the filing of the petition, there was no benefit to be granted relative to suspending its use. Simply put, the system had never actually been implemented, not before, nor after, the filing of the petition. In any event, the facts establish that there was no prepetition "problem" concerning the preferred scheduling system that Wal-Mart could "fix" to influence the voters. It logically follows that there was no benefit or improvement in working conditions. Accordingly, I conclude that the General Counsel has failed to establish the allegation set forth in subparagraph 5(i)(1) of the complaint. Therefore, I shall recommend that this subparagraph of the complaint be dismissed.

*New grates in the TLE garage:* It is alleged in subparagraph 5(i)(2) of the complaint that the Respondent installed new grates in the TLE garage. Witnesses Jones, Lewis, and Brooks all testified that the oil grates in the garage were old, falling apart, and unsafe, or words to that effect. The employees testified that prior to the filing of the petition they had made repeated complaints to management about the condition of the grates. These grates separated the upper and lower bays and the wheels on them had broken or become misaligned. As a result, the grates had become unstable, resulting in some incidents where the grates were dislodged. Employees were almost injured when the grates slipped, causing the employees to come close to falling through to the lower bay. Russell Harrell, a former employee and member of the safety committee, testified that he had heard about the problem with the grates in the TLE, and that the safety committee had recommended that they be fixed. This was apparently sometime in 2000. According to the employees, despite their complaints, management made no effort to solve the problem until after the petition was filed.

TLE Manager Eidson testified that prior to his leave of absence, he was unaware of any operational or safety issues with the grates, and no employee had complained to him about them. When he returned from leave, the grates had been replaced. Kirk Williams and Ragnar Guenther both testified that arriving at the facility they learned for themselves that the grates were defective and unsafe. Guenther asked Vicky Dodson for permission to have the grates replaced. Dodson, who was the onsite leader of the Arkansas labor relations team, was requiring that all proposed changes in the TLE be cleared through her.

[8] A play by William Shakespeare.

This requirement was allegedly in an effort to avoid the commission of any unfair labor practices. Ultimately, she informed Guenther that he could replace the grates, which he did.

I believe that the former employees testified credibly about the condition of the grates, and the fact that although management was aware of their complaints, the problem was not corrected until after the petition was filed. The testimony of the former member of the safety committee was highly probative. Further, I do not find as plausible the testimony of Eidson that he was unaware of this problem. Having heard approximately 3 weeks of testimony concerning the operation of the Kingman TLE, I have little doubt that it was not a well-run operation. The problem with the grates was a serious safety hazard, and an employee could have easily been seriously injured or even killed by a fall from the upper to the lower bay. I cannot understand why management did not act to replace the grates long before the petition was filed. In any event, Williams and Guenther recognized the problem for the safety hazard it was and Guenther sought to solve the problem shortly after arriving at the facility. However, the issue remains whether the replacement of the grates after the petition was filed constituted coercive action on the part of the Respondent.

As noted above, under applicable Board precedent, there is an inference that benefits granted employees during a petition period are coercive. *Lampi, L.L.C.,* supra. The critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. *United Airlines Services Corp.,* supra. The same test is applied in unfair labor practice cases. *Holly Farms Corp.,* supra; and *Speco Corp.,* supra. Therefore, in the matter at hand clearly there exists an inference that the replacement of the grates during the petition period was coercive. This had been a significant issue to the TLE employees for a considerable period of time, and the Respondent's replacement of the grates prior to the scheduled election would reasonably be expected to influence the employees' vote.

In my view, there is no doubt that management had been aware for a considerable period of time prior to the filing of the petition that there was a problem with the grates. While the Respondent denies this prepetition knowledge, it argues that upon Guenther's arrival at the facility, he became aware of a safety issue that required an immediate resolution. However, the Board has held that regardless of a desperate need for safety equipment (safety showers, gloves, face shields, burn spray, burn and acid neutralizer, and a breathing air system), the procurement of these items by an employer during a petition period violated Section 8(a)(1) of the Act. This is especially appropriate where the employer had ignored the employees' safety concerns for a significant period of time. *Pure Chem Corp.,* 192 NLRB 681 (1971). See also *International Harvester Co.,* 170 NLRB 1074 fn. 1 (1968) (where an 8(a)(5) violation was found).

The Respondent had for a long period of time prior to the filing of the petition ignored the damaged grates, which created a significant safety hazard. It is commendable that Guenther, on his arrival at the facility, took it upon himself to correct the problem. Nevertheless, this constituted a benefit to the employees and a departure from the Respondent's past practice. It would have reasonably been expected to influence the vote of the TLE employees in the scheduled election. As such, it had the effect of interfering with, restraining, and coercing the employees in the exercise of their Section 7 rights. Accordingly, I conclude that the Respondent has violated Section 8(a)(1) of the Act, as alleged in subparagraph 5(i)(2) of the complaint.

*New grease gun and repaired or new sir tools and other equipment*: It is alleged in subparagraphs 5(i)(3) and (4) of the complaint that the Respondent replaced or repaired certain equipment in the TLE garage including grease guns and air tools. The General Counsel argues that the employees had long complained to management about the poor condition of certain equipment in the garage, which complaints had been ignored until after the filing of the representation petition. There was testimony from a number of employee witnesses about the condition of various pieces of equipment, and whether, and when they were replaced. This included the tire mounting machine, tire balancer, air compressor, grease guns, grease gun tips, hydraulic jacks, and alignment rack. For the most part, the undersigned was unimpressed with this testimony. I found it to be vague, confusing, and contradictory. This included the testimony of Brooks, Lewis, Jones, and Bettinger. A number of the Respondent's witnesses, including Eidson and Guenther, testified that either they were unaware of any employee concerns about this equipment, or that the Employer had been attempting to correct the problem since prior to the filing of the petition, or the matter was a safety concern requiring immediate attention, or that any equipment repaired or replaced was essential to operations.

For demonstrative purposes, the air compressor serves as a good example. The undisputed evidence establishes that the compressor operates all of the air driven equipment in the TLE. Former employee Gregory Lewis testified that prior to the filing of the petition, the compressor was always malfunctioning, making it very difficult to perform the various operations in the garage. The compressor provided power to the oil guns, to the air guns, and to the lifts. According to Lewis, attempts had been made prior to the petition to repair the compressor by rebuilding the motor, but the effort was unsuccessful. Finally, after the petition was filed, the compressor was replaced. (GC Exh. 18.) Eidson testified that prior to going on medical leave, the compressor had been repaired. According to Guenther, after he arrived, it malfunctioned. He tried to get by using smaller compressors brought from the sales floor, but this was not effective. As he needed the big compressor to run the shop, Guenther sought and received permission from Vicky Dodson to replace the compressor. He testified that prior to replacing the compressor, no employee had complained to him about this problem.

There is no dispute that all the equipment in the TLE gets heavy, consistent use. The TLE is, after all, an automotive garage. Equipment wears out, and without certain equipment the shop cannot function effectively. This is certainly true for the air compressor, without which the shop can really not function at all. It almost goes without saying, that if the Respondent is to continue to operate a TLE, broken or malfunctioning equipment must be repaired or replaced. In my view, the various pieces of equipment as were alleged in these two subparagraphs of the complaint were necessary, if not essential, to operate the TLE. As need required, those pieces of equipment were fixed or replaced. The record evidence, and the reality of the real world, indicates that such repairs or replacements were based on routine, operational decisions. While the alleged equipment changes occurred after the filing of the petition, this really is not all that suspect in view of the fact that Guenther arrived at the facility functioning as acting TLE manager shortly after the petition was filed. As I have said, the Kingman TLE had not been a well-run operation. However, with the arrival of Guenther, an experienced TLE manager, the operation apparently improved. Obviously, Guenther was going to repair or replace equipment whenever that was necessary for the efficient operation of the shop. To do less, would have been irresponsible.

I do not detect a pattern of conduct as would establish that the Respondent repaired or replaced the equipment in question in an effort to influence the employees' vote in the scheduled election. Further, I do not view the repaired or replaced equipment as a "benefit" calculated to have that effect. *United Airlines Services Corp.,* supra. It seems clear to me that the equipment was replaced or repaired as part of the Respondent's routine process in operating its TLE business. As such, it would not constitute a violation of the Act. See *Zartic, Inc.,* 277 NLRB 1478, 1496 (1986); and *Stanley M. Feil, Inc.,* 250 NLRB 1154, 1165 (1980). I question whether the repair or replacement of the equipment at issue can even be considered a "benefit" at all to the employees, except in the sense that without properly operating equipment the employees would have no jobs, as the TLE would be out of business. I conclude that the Respondent has rebutted any inference that the equipment repaired or replaced during the period prior to the scheduled election was coercive of its employees' Section 7 rights. *Uarco Inc.,* supra.

Based on the above, I conclude that the General Counsel has failed to establish the allegations set forth in subparagraphs 5(i)(3) and (4) of the complaint. Therefore, I shall recommend that these two subparagraphs of the complaint be dismissed.

*The cooling system:* It is alleged in subparagraph 5(i)(5) of the complaint that the Respondent replaced or repaired the cooling system and fans in the TLE garage. This action is alleged to constitute a benefit intended to unlawfully influence and coerce the employees in the exercise of their Section 7 rights. In general, the employee witnesses testified that prior to the filing of the petition, the cooling system did not work properly, and, that despite repeated complaints to management, the system was not adequately repaired until after the petition was filed. The Respondent argues that any repairs made to the cooling system after the petition was filed were simply part of its routine operational decisions or were based on safety concerns, and not intended to influence the employees' vote in the scheduled election.

I take administrative notice that Kingman, Arizona, is located in the "high desert" where summer temperatures frequently rise to over 100 degrees. It would not be an understatement to suggest, as witnesses did, that the summer in Kingman is long and hot, especially in an automotive garage. All the witnesses seem to agree that a cooling system in the TLE garage was more than a mere luxury. Unfortunately, there was considerable disagreement regarding the history of the facility's cooling system.

Former employees Jones and Brooks testified that in approximately December 1999, some cooling fans and misters that the Respondent had ordered were delivered to the TLE, but that they simply remained on the property uninstalled. Apparently in April 2000, the fans and misters were mounted, however, they functioned for only 1 day. According to Jones and Brooks, the pump shaft broke, causing the system's motor to malfunction. Brooks testified that at the request of TLE Manager Eidson, he contacted the cooler's manufacturer to determine if they would replace the motor under warranty. Brooks was told that the cooling system would not be repaired under warranty, and he so informed Eidson. Allegedly, the system remained unrepaired from April until after the petition was filed, but before the scheduled election. Employees Jones, Lewis, and Brooks all testified that prior to the filing of the petition they complained repeatedly to various managers about the heat in the garage and lack of adequate cooling. Specifically, Jones testified that he complained to Eidson "at least a half dozen" times.

According to the testimony of Larry Eidson, fans arrived at the facility in November 1999, but as it was wintertime, the fans were not installed until April 2000. They worked for 1 day, and then the shaft broke on the mister pump. As the cooling system was under warranty, Eidson called the manufacturer, who suggested that the system had been incorrectly mounted. He called the company that had installed the fans, but there was apparently some disagreement between the manufacturer and installer as to which one was responsible for the malfunction. That was where the situation remained when Eidson went on medical leave in July 2000. When he left, the system was still not functioning. However, when he returned from leave in September, the fans were working. Ragnar Guenther testified that when he arrived at the Kingman TLE in September, the fans were on, but the misters did not work. The mister mounted on the wall leaked water into an electrical outlet. Allegedly, he noticed the problem himself, without any employee complaining to him. In any event, he acknowledges seeking and receiving permission from Vicky Dodson to have the system repaired. He had the pump motor replaced, after which the system worked, but the pump tube kept clogging.

While the witnesses may disagree somewhat about the exact sequence of events, it is clear that the cooling system was not functioning prior to the filing of the petition, but that after the petition was filed, and before the scheduled election, it was repaired and functioning. I credit the testimony of the employee witness that they complained to various managers about the heat in the garage, and specifically the testimony of Jones who complained to Eidson "at least a half dozen" times. On the other hand, I do not believe Eidson, who testified that prior to the petition, no employee complained to him about either the heat in the garage or the fact that the cooling system was inoperable. He tried to minimize the unpleasant temperature conditions in the garage, testifying that in June/July it is "warm," rather than hot, and that he personally did not find the temperature uncomfortable. In this respect, his testimony was inherently implausible. Similarly, I also find Guenther's testimony incredible when he claimed that no employee complained to him about the inoperable cooling system, but that he simply noticed on his own that a mister was leaking water into an electrical outlet.

I have no doubt that employees repeatedly complained to management about the heat in the garage and the broken cooling system. Eidson and other managers were certainly aware of these complaints prior to the filing of the petition. After all, Eidson had at least made some effort to have the cooling system repaired prior to going on leave in July. Also, Regional Personnel Manager Tim Scott testified that a few days after he started serving as interim TLE manager, he heard Brooks or Lewis tell Vicky Dodson that the mister had not been working for some period of time. Yet, despite the obvious, that management was aware of employee complaints about the heat in the garage, the Respondent still argues that the cooling system was repaired either because it constituted a safety hazard or as part of normal routine maintenance. This argument I do not accept.

The Respondent was aware that the cooling system was not functioning properly as early as April. There was ample opportunity to have the system repaired as part of "routine maintenance" into late August, had management wanted to do so. Of course, some effort was made by Eidson to have the system repaired prior to going on leave in July, but it is clear that it was not a priority, as the system was not repaired. Not until September, after the petition was filed, did management treat the matter like a priority and have the repairs promptly made. Also, I do not believe that Guenther considered a leaking mister as a safety hazard that required the entire system be repaired. The one mister only could easily have been moved or repaired so as to not leak into the outlet. However, the Respondent had the pump motor replaced, which remedied the employee complaints about the heat.

Based on the above, I conclude that the Respondent has failed to rebut the inference that the benefit granted to the TLE employees during the petition period, namely the repaired cooling system, was coercive. *Lampi, L.L.C.,* supra; and *Uarco Inc.,* supra. In my view, it is obvious that the cooling system was repaired for the purpose of influencing the employees' vote in the election, and that the repair was reasonably calculated to have that effect. *United Airlines Services Corp.,* supra. As such, it interfered with, restrained, and coerced the employees in the exercise of their Section 7 rights. Accordingly, I conclude that the Respondent has violated Section 8(a)(1) of the Act, as alleged in subparagraph 5(i)(5) of the complaint.

*Shopping cart corral:* The General Counsel alleges in subparagraph 5(i)(6) of the complaint that the Respondent installed a shopping cart corral in the facility parking lot. It is alleged that this constituted a benefit to the TLE employees that was intended to interfere with and coerce them in the exercise of their Section 7 rights. Employee Lewis testified that it was the TLE employees' job to "round up carts," presumably in the general vicinity of the TLE. According to Lewis, he had complained to Jeff Sallee, former TLE manager, about having shopping carts get in the way when he moved vehicles in and out of the garage. After the petition was filed, the Respondent installed a "cart rail" in the parking lot near the TLE, which Lewis thought "was really great," as carts would no longer get in the way. Employee Jones testified that a cart moved by the wind had damaged his wife's new car. He complained to Jeff Sallee, but nothing happened. Jones was of the belief that prior to the petition period, a cart damaged at least one other TLE employee's car. It should be noted that the record reflects that Jeff Sallee was the Kingman TLE manager prior to Larry Eidson, which would have been before the petition was filed.

Ragnar Guenther testified that a number of weeks after he became TLE regional manager, during the petition period, a customer informed him that the customer's vehicle had been damaged by a shopping cart and the customer wanted Wal-Mart to pay for the damages. Guenther filed an insurance claim for the customer, and reported the incident to Vicky Dodson. He recommended a cart corral, which Dodson approved. Guenther and the store manager then installed a cart corral, which had been at the facility for some time, but in an unassembled state. It was Guenther's hope that a corral would cause customers to return the carts to that location, reducing the potential for damage caused by loose carts. Guenther testified that no employee had complained to him about having to retrieve loose carts, or to report that an employee's personal vehicle had been damaged. Labor Relations Manager Kirk Williams' testimony regarding the cart corral generally supported Guenther.

I do not believe that the installation of a cart corral was a significant benefit to the TLE employees, nor do I believe that Guenther installed the corral in an effort to influence the employees' vote. *United Airlines Services Corp.,* supra. Rather, I am of the belief that the Respondent had the corral installed primarily in an effort to avoid liability for the damage to customers' cars. Any benefit to the employees was simply collateral. However, I really do not view this as much of an employee benefit. At most, it eliminated the occasional need to move a cart out of the way, and perhaps the caution to park their private vehicles away from wind blown carts. The Respondent's conduct should certainly be considered as routine, based on operational decisions. *Zartic, Inc.,* supra; and *Stanley M. Feil, Inc.,* supra. Further, I credit Guenther's account, supported by Williams, that he requested the installation of the corral following the cart damage to a customer's car. The Respondent has, therefore, rebutted the inference that the installation of the cart corral, coming within the petition period, was an unlawful grant of benefit. *Uarco Inc.,* supra.

I conclude, based on the above, that the General Counsel has failed to establish, by a preponderance of the evidence, the allegations set forth in subparagraph 5(i)(6) of the complaint. Therefore, I shall recommend dismissal of this subparagraph of the complaint.

### 4. Removal of Mike Buckner

Paragraph 5(l) of the complaint alleges that as a result of the solicitations of Tom Coughlin, the Respondent removed Mike Buckner from his position as store manager. The General Counsel contends that this action was taken because the TLE employees had expressed displeasure with Buckner, and for the calculated purpose of influencing the outcome of the election.

The Respondent argues that the decision to transfer Buckner to another store was a legitimate business decision, unrelated to any grievances that employees may have had with the store manager.

Buckner had served as the Kingman store manager for approximately 5 years, and was the manager when the petition was filed on August 28. Jay King, district manager, assumed that position in the Las Vegas, Nevada, and Kingman areas on September 18. King testified that he found the Kingman store in disarray each time he toured the store during the month of September. According to King, there were problems with merchandising, the receiving process, the store was not clean, and the outside was littered with pallets and shopping carts. Also, King testified that he noticed that Buckner's personnel evaluations were poorly done and Buckner was not communicating well with employees. During King's early period at the facility, he spoke with Buckner about these problems and made suggestions, but Buckner did not seem able to correct the deficiencies. In general, King found Buckner to be withdrawn, without humor or creativity, and lacking in inspiration. Buckner looked tired and sick. According to King, he was concerned that Buckner would not be able to effectively perform his job during the upcoming holiday season, or to effectively communicate the Company's messages during the union campaign. At some point during early October, King reached the conclusion that Buckner needed to be removed as the store manager.

Vicky Dodson's testimony supported King. According to Dodson, Buckner appeared withdrawn, stressed, fragile, and uncommunicative. He appeared unhealthy and tired, and did not seem like an effective store manager. She and King spoke with Tom Coughlin about this matter on October 9, prior to Coughlin's meeting with the TLE employees. Dodson testified that she and King told Coughlin that Buckner did not seem to have the energy and stamina to be an effective communicator, or to run the store on a ordinary basis, "much less with a petition." Both Dodson and King testified that Coughlin essentially told them to take whatever action they believed appropriate to resolve the store manager problem.

It is undisputed that in his meeting with the TLE employees, Coughlin asked them how Buckner was doing, whether he was doing a good job, and if he was the right leader for the store, or words to that effect. It is also undisputed that one employee said something positive about Buckner and at least one, and possibly two employees, made negative comments about him. Also, Jay King acknowledged that prior to the day Coughlin was at the facility, King had heard complaints about Buckner from a number of store employees, including Brad Jones, who complained that Buckner had been unresponsive to his concerns.

It is the General Counsel's contention that the TLE employees wanted Buckner removed as store manager, and that the Respondent did so, in an effort to satisfy the employees, thereby, inducing them to reject the Local Union. However, the problem with this theory is that it does not appear that the union supporters in the TLE wanted Buckner removed. To the contrary, the TLE employees generally liked him. Brad Jones testified that he was unhappy when Buckner left and did not feel it was fair to him. Jones even went so far as to tell King that he thought it was a "rotten deal," and he hoped the transfer was not the result of the petition. Greg Lewis testified that when Buckner's departure was announced, he told Dodson and Kirk Williams that he did not want Buckner to leave. Will Brooks also testified that he told Dodson and Williams that he did not want Buckner to leave. There was no "ground swell" of hostility by the TLE employees seeking the removal of Buckner as store manager, and no reason why management would have gotten that impression. A few negative comments by employees should certainly not have been sufficient to lead management to believe that there was significant enmity to Buckner. As I have indicated, the opposite was apparently true.

Further, I credit the testimony of Dodson and King that the decision to remove Buckner was made prior to the meeting between Coughlin and the TLE employees. I believe that the primary reason why management decided to transfer Buckner was because, from the Respondent's viewpoint, he had not been an effective manager. After all, it was "on his watch" that the petition had been filed. Without specifically saying so, I believe that King and Dodson saw Buckner as a "broken man." He was characterized by various witnesses as tired, sick, uncommunicative, without humor or creativity, and lacking in inspiration. Not only was management unhappy with the way Buckner had been running the store, they were particularly concerned about whether he would be able to lead a successful campaign against the Local Union. After all, this was of paramount concern to the Arkansas labor relations team, which had come to the Kingman facility specifically to defeat the organizational campaign.

Having decided to remove Buckner from the store, all that remained for management was to find a method by which this could be accomplished with as little disruption as possible. To the credit of the managers involved, the Respondent appears to have done this in a fairly humane way. According to the testimony of Regional Personnel Manager Tim Scott, he, King, and Buckner attended a dinner meeting the second week of October. When they discussed Buckner's performance and situation, he "almost broke down." The suggestion was made to Buckner that he might want to transfer to another store as a comanager, and he was "relieved" to accept that option. A transfer was arranged for him to a store in Oregon, near where he had family. There is no question that this was a demotion, since he would not be the manager and his potential over all compensation was reduced. Never the less, Buckner seemed genuinely pleased to take the transfer. Buckner testified that when he met with King and Scott, he admitted being stressed, losing sleep, and that his chest hurt. He told King that he was experiencing the most stress he had ever been through. According to Buckner, he was relieved at the prospect of a transfer, and felt that he would be getting a new start.

Based on the totality of the probative evidence, I am convinced that the Respondent transferred Buckner because it made a business decision that Buckner had been an ineffective store manager, and would not likely be able to correct the problem in the middle of a union organizing campaign. The Respondent was looking for a store leader who could best support its argument that the employees did not need "third-party representation." On the other hand, it does not appear that the TLE employees were particularly unhappy with Buckner, or that management had that impression. I do not believe that Buckner was transferred from the Kingman facility in response to employees' grievances or to improve their working conditions in an effort to influence their votes. Accordingly, I conclude that the General Counsel has failed to establish the allegations as set forth in paragraph 5(l) of the complaint. Therefore, I shall recommend the dismissal of that paragraph of the complaint.

5. Futility of selecting the Union and refusal to negotiate

It is alleged in subparagraph 5(m)(2) of the complaint that in mid-October 2000, Jay King informed employees that it would be futile for them to select the Local Union as their bargaining representative. Similarly, it is alleged in paragraph 5(q) of the complaint that in January 2002, Kirk Williams threatened employees that if they selected the Local Union as their representative, the Respondent need not negotiate.

King became the district manager for the Las Vegas, Nevada, and Kingman, Arizona areas on September 18. On October 19, he conducted a meeting for the TLE employees at the facility to explain the collective-bargaining process. According to the testimony of Will Brooks, at this meeting King described the potential bargaining scenario as Tom Coughlin appearing at the negotiating table with the Wal-Mart attorneys. Brooks acknowledged that King repeated what the managers had said many times, namely that as a result of the negotiations the employees might get more benefits than they presently had, or they could get less, or they could get the same. Further, King is alleged to have said that while the law required Wal-Mart to negotiate in good faith, the Employer did not have to agree to any particular union proposal. It was during this presentation that King is alleged by Brooks to have asked the question, "Why would he [Coughlin] change benefits and pay for 18 people when he has over a million employees?" This reference was apparently to the approximately 1 million employees who worked for Wal-Mart nationally, as compared to the approximately 18 employees in the petitioned for unit.

According to King, at the meeting on October 19, he showed a video and discussed the collective-bargaining process. He confirms the testimony of Brooks that he told the employees that while Wal-Mart was obligated to negotiate in good faith, the law did not require it to agree to any particular union proposal. He reminded the employees that bargaining could result in their receiving more benefits, less benefits, or the same benefits as they currently received. He indicated the process could be lengthy and suggested that Coughlin himself might wish to participate. However, King specifically denies that he ever said that Coughlin would refuse to change the wages or benefits for the TLE employees because they were only 18 out of 1 million employees. He admits that he told the employees that if the parties could not agree on a contract, the Local Union would have the option of giving up, giving in, or going out on strike. Also, they discussed economic strikes. Employee Joe Bettinger was at the meeting, and his testimony essentially supported King. According to Bettinger, King said that Coughlin would negotiate in the Employer's best interest, but King did not suggest that Coughlin would refuse to change benefits for 18 employees in the TLE when he was responsible for over 1 million other employees. Kirk Williams was also present at the meeting in question and his testimony supported King's version of what was discussed. He denies that King made any reference to Coughlin refusing to make changes for 18 out of 1 million employees.

To the extent that counsel for the General Counsel argues that King's presentation in its entirety conveyed a message of futility in selecting a bargaining representative, I disagree. The Board has held that an employer's message to its employees that union representation was no guarantee of better benefits and might result in less desirable benefits is legitimate campaign propaganda, which employees are capable of evaluating. Such expressions of views are protected by Section 8(c) of the Act. *Mediplex of Connecticut, Inc.,* 319 NLRB 281, 281 (1995). Further, the Board has indicated that an employer does not violate the Act when it informs its employees that they may end up with more, the same, or less benefits, as long as the employer makes it clear that this must be part of the collective-bargaining process. *Noah's New York Bagels,* 324 NLRB 266 (1997). Even statements by an employer stating the possibility that the employees may face "long bitter negotiations" and a "long and ugly strike" if they selected the union, has been held by the Board not to constitute a message of futility. *General Electric Co.,* 332 NLRB 662 (2000). Any such statements by King were merely an expression of the Respondent's opinion as to what might happen if the Local Union was selected by the employees, and did not constitute a violation of the Act.

Further, I do not believe that Jay King made any comment suggesting to the TLE employees that Coughlin would not change their benefits because they were only 18 out of 1 million employees, or words to that effect. I credit the testimony of King, Williams, and Bettinger over that of Brooks. King strikes me as an intelligent, fairly sophisticated manager who, I doubt, would make a statement of the type alleged. Also, the "talking points" prepared for his use during the meeting in question cover the subject of collective bargaining and those matters everyone agrees were discussed, without making the offending statement. (R. Exh. 24.)

Further, the testimony of King, Williams, and Bettinger seemed inherently more plausible than did that of Brooks, who I believe simply was confused and inferred more into King's statements than what was said.

Accordingly, I conclude that Jay King did not make the offending statement in question on October 19, or any other date, as would indicate to employees that it would be futile for them to select the Local Union as their bargaining representative. Therefore, I find that the General Counsel has failed to establish the allegations as set forth in subparagraph 5(m)(2) of the complaint. I shall recommend dismissal of this subparagraph of the complaint.

As noted above, the General Counsel also alleges in the complaint that in January 2002, Kirk Williams threatened employees that if they selected the Local Union as their bargaining representative, the Respondent need not negotiate. The evidence is undisputed that Williams did return to the Kingman facility in January 2002, in response to a belief that the election might be unblocked. He then conducted a meeting for the TLE employees. Larry Adams, who was a service writer at the time, testified that at the meeting Williams talked about the open door policy and the Respondent's belief that the employees did not need union representation. According to Adams, Williams also said, "[T]here was no way that they would negotiate with the Union," and that the employees would "basically just loose our benefits and stuff." On cross-examination, Adams expanded his testimony and indicated that Williams said if the employees selected the Union, that Wal-Mart would not talk to the Union, or even sit down at the bargaining table with the Union. Adams was the only witness who testified that Williams made these statements.

Williams testified that he spoke to the TLE employees about the collective-bargaining process, telling them that if the Union were selected the Employer would bargain in good faith, but that it was not required to agree to any specific demands, and that negotiations could take a long time. Further, he indicated that as a result of the negotiation process the employees might end up with more benefits, less, or the same. Williams denied that he said the Employer would refuse to negotiate or that it would not talk to the Union. His testimony was supported by a number of other individuals who were present for the meeting, including employee Joe Bettinger, Store Manager Jeff Van Horn, and District Manager Ragnar Guenther.

I am of the view that Williams did not make the offending statements attributed to him by Adams. Kirk Williams was an experienced labor relations manager and attorney, and I do not believe he made statements that so clearly and blatantly would constitute a violation of the Act. Anyone with even the most elementary understanding of labor law knows that it would be illegal for an employer to simply refuse to negotiate with a properly certified labor organization. Certainly Williams knows this, and he also knows that making such a statement to a group of employees would almost certainly guarantee the filing of a meritorious unfair labor practice change. Williams' denial is supported by the weight of the witness testimony, as well as by the "talking points," which he used in addressing the employees. (R. Exh. 25.) It is totally implausible that he made the offending comments. I am left with the belief that Larry Adams simply misunderstood Williams' comments, and assumed more than what was said, or should have reasonably been construed. It is significant to note that no other employees who were at the meeting, including even union supporter Brad Jones, testified that the statements in question were made.

Based on the above, I conclude that the General Counsel has failed to establish the allegations contained in paragraph 5(q) of the complaint. Therefore, I shall recommend that this paragraph of the complaint be dismissed.

6. Threats to eliminate benefits

It is alleged in paragraph 5(n) of the complaint that between August 28 and September 30, 2000, Dodson, Williams, and other managers threatened employees that they might lose their stakeholders' bonuses and discount cards if they selected the Local Union as their bargaining representative. Similarly, it is alleged in paragraph 5(w) of the complaint that on October 14, 2000, the Respondent posted a notice at its Kingman facility, which threatened employees that raises would be withheld if they selected the Local Union.[9]

Greg Lewis testified that at a storewide meeting held on August 30, an employee asked what would happen to the rest of the store if the TLE employees "brought in a union." According to Lewis, Vicky Dodson and Kirk Williams responded that "it would effect all of the associates, that there was a possibility that all of the associates would lose their discount cards, their stakeholders' bonuses, the yearly bonus." In response to another question as to whether the store employees might lose their health benefits, they allegedly responded, "it was a definite possibility." In a more general way, Lewis seems to allege that Dodson and Williams made similar statements to assembled store employees at other unspecified times. Will Brooks testified in a similar way that on several unspecified occasions, he heard Dodson and Williams tell groups of store employees that, "because of TLE filing the petition that the whole store is going to loose their shareholders' bonuses and their discount cards." According to Brooks, later in the campaign Williams "narrowed it down to just the TLE was going to lose their shareholders' bonuses and the discount cards, and the rest of the store was going to keep theirs." Larry Adams testified that in January 2002, Kirk Williams, while addressing a group of TLE employees, said, that if they selected the Local Union, "we would basically just loose our benefits and stuff.''

The record is undisputed that an employee "discount card" allows an employee to purchase most items sold by Wal-Mart at a 10 percent discount. Also, the "stakeholders' bonuses program" is a profit sharing arrangement for employees that has provided the employees at the Kingman facility with an extra approximately $400 to $600 per year, depending on whether, and to what extent, the store is profitable. Clearly, these are benefits that the employees at the facility have been receiving.

It should be recalled that prior to the issuance of the Decision and Direction of Election in the representation case on September 29 (GC Exh. 20), the Respondent was taking the position that the appropriate unit should consist of a storewide unit. Until that time, the Respondent's managers would frequently make presentations to groups of storewide employees during which it was assumed that the collective-bargaining process would impact them, as well as the TLE employees. Vicky Dodson testified that the subject of discount cards came up in at least two meetings. In response to a question from an employee about whether they would loose their discount cards if they voted in the Local Union, she responded that there was no way to predict the collective-bargaining process, and that employees might end up with more, less, or the same benefits.

[9] At the hearing, I granted counsel for the General Counsel's motion to amend the complaint to allege this contention as a violation of the Act. Counsel for the Respondent objected to the proposed amendment. I permitted the amendment because I determined that the new allegation was "closely related" to the timely filed charges in this case. The new allegation involved the same legal theory, and arose from the same factual circumstances. Also, the Respondent was not prejudiced by the amendment as it had already raised a similar defense and had ample opportunity to raise additional defenses. See *Redd-I, Inc.,* 290 NLRB 1115 (1988); and *Nickles Bakery of Indiana,* 296 NLRB 927 (1989). Therefore, I concluded the amendment was proper.

She denied ever telling employees, or hearing any other manager telling employees, that they would lose their discount cards or stakeholders' bonuses.

Kirk Williams recalled the matter of stakeholders' bonuses and discount cards being raised at the first storewide meeting on August 30. He testified that it was explained to the employees that there would be no changes in benefits simply because a petition had been filed. However, if the employees selected the Local Union, all benefits would go on the bargaining table, and the result might be more, less, or the same benefits. Williams recalled the issues arising for a second time in September, with essentially the same response from management. He denied ever saying that employees would lose their stakeholders' bonuses or discount cards, or words to that effect.

Mike Buckner testified that he was present at meetings when employees asked questions about the status of stakeholders' bonuses and discount cards. According to Buckner, Dodson and Williams gave the same "standard answer" each time, which was that in a bargaining situation, employees could end up with more, less, or the same benefits they currently had. He denied ever hearing Dodson or Williams telling employees that they would lose their stakeholders' bonuses or discount cards. Employees Dorothy Haddock, Sherri Quinn, and Sharon Ford all testified about the stakeholders' bonuses and discount card issues, essentially corroborating the testimony of the managers.

Once again, I am required to determine whether or not Dodson or Williams made certain statements. As I have previously, I continue to believe that these two experienced labor relations managers did not make the statements attributed to them by the witnesses for the General Counsel. In my opinion Dodson and Williams were too experienced and astute to have told employees that if the Local Union was selected as a bargaining representative that the employees would lose specific benefits such as the stakeholders' bonuses and discount cards. It is much more likely that what they said was that the collective-bargaining process is uncertain, and the result might be more, less, or the same benefits than they currently enjoyed. That, of course, is precisely what Dodson, Williams, Buckner, Haddack, Quinn, and Ford testified was said. Their versions of the statements in question were certainly inherently more plausible than that of Lewis, Brooks, and Adams. I believe that Lewis, Brooks, and Adams read more into the statements than was either said or could reasonably be implied, just as they seemed consistently to have done.

Based on the weight of the evidence, I have concluded that any reference to either the stakeholders' bonuses or discount cards by Dodson or Williams was made in the context of the collective-bargaining process, and the possibility that the results of negotiations might be a loss, gain, or maintenance of existing benefits. Such statements made either to the TLE employees, or early in the campaign to storewide employees, which point out the potential consequences of collective bargaining, do not violate the Act. This constitutes legitimate campaign propaganda, which employees are capable of evaluating. Such expressions of views by the Respondent are protected by Section 8(c) of the Act. *Mediplex of Connecticut, Inc.,* supra. Accordingly, I conclude that the General Counsel has failed to establish the allegations set forth in paragraph 5(n) of the complaint. I shall, therefore, recommend that this paragraph of the complaint be dismissed.

Regarding the alleged threat to withhold raises, it is undisputed that during the petition period the Respondent provided a question box outside the employee breakroom into which employees could insert questions. The members of the labor relations team informed the employees that they could submit any question and that the Respondent would post its response for all employees to see. The record establishes that the following question was received on October 12, and the following answer posted on October 14: Question: "What happens to raises in the TLE while they're waiting on a contract?" Answer: " Wal-Mart would not be allowed to give any discretionary raises, such as merit increases, while negotiations continued. In general, no provision of a collective-bargaining agreement is put in place until the parties agree on every part of the agreement." (GC Exh. 10g.)

At the hearing, the undersigned permitted counsel for the General Counsel to amend the complaint, as paragraph 5(w), to allege this posting as a violation of the Act. In his posthearing brief, counsel for the Respondent renewed his original objection to the amendment on the basis of Section 10(b) of the Act. However, I continue to believe that the amendment was appropriate as the new allegation was "closely related" to the timely filed charges in this case. (See argument and cases cited above in fn. 9.)

Generally, an employer may not withhold raises, make threats to withhold raises, or depart from preexisting policies in light of the filing of a representation petition. An employer must grant the preexisting benefit as if the union were not on the scene. *Parma Industries,* 292 NLRB 90, 91 (1988); and *Gupta Permold,* 289 NLRB 1234, 1234–1235 (1988). The Board provides an exception whereby an employer may withhold a benefit and comment without violating the Act. However, for this exception to apply, the employer must make it clear to the employees that the adjustment would occur whether or not they select a union, and that the sole purpose of the adjustment's postponement is to avoid the appearance of influencing the election's outcome. *Atlantic Forest Products,* 282 NLRB 855, 858 (1987); and *Uarco, Inc.,* 169 NLRB 1153, 1154 (1968). Also, the employer cannot place the burden for the postponement on the union. *La Marche Mfg. Co.,* 238 NLRB 1470, 1481 (1978); and *American Telecommunications Corp.,* 249 NLRB 1135, 1137–1138 (1980).

In my view, the Respondent's posted answer is a violation of the Act. It indicates that "discretionary raises, such as merit increases," which it apparently had a past practice of awarding, "would not be allowed . . . while negotiations continued." All that the employees learned from the posting was that until negotiations for a collective-bargaining agreement concluded, the Respondent was going to have to deprive them of a benefit, which they had previously enjoyed. Of course, this potential loss would only occur if the Local Union won the election. The employees were likely to identify the Local Union, or at least the union supporters, as the villain in this scenario. Further, at no point in the posting does the Respondent indicate to the employees that the Respondent is withholding the raises because it wants to avoid the appearance of influencing the election's outcome, and that ultimately the raises will be granted regardless of whether the Local Union wins or loses. This posting was likely to have caused any employees affected by the potential withholding of raises to be upset with the Local Union, or its supporters.

While the complaint does not allege as separate violations of the Act any oral statements by managers threatening to withhold raises, such statements do tend to support the inferences that employees would have received upon reading the posting in question. Employee Joe Bettinger testified that in September/October, either Store Manager Jim Winkler, or TLE Manager Larry Eidson indicated that merit raises were "frozen." This is credible evidence in view of the fact that Bettinger almost always testified favorably towards the Respondent. Also, employee David Carter testified that he was informed by both Kirk Williams and Larry Eidson that "while the petition was pending, that merit raises were on a freeze." Again, this testimony is credible because Carter had demonstrated hostility towards the Local Union when he signed a letter seeking a withdrawal of the representation petition. Greg Lewis testified that Vicky Dodson, Kirk Williams, and Jay King made similar comments, with the managers specifically saying that merit raises would not be given, as it would appear "like they were buying us off." Finally, former Assistant Manager Anthony Kuc also testified that Dodson made similar statements in the presence of employees about merit raises being frozen.

From the record evidence it appears that there was a well-established past practice at the Kingman facility of awarding merit, or discretionary raises. As such, these raises were not a benefit the Respondent had merely been contemplating instituting at the time the petition was filed. They were an existing benefit, which the Respondent needed to continue to award as if the Local Union were not on the scene.

Based on the credible evidence, and legal argument presented by counsel for the General Counsel and counsel for the Charging Parties in their respective posthearing briefs, I conclude that the answer posted by the Respondent at its Kingman facility on October 14, 2000, constituted a threat to employees to withhold raises if they selected the Local Union as their collective-bargaining representative. Therefore, I find this posting, as alleged in paragraph 5(w) of the complaint, to constitute a violation of Section 8(a)(1) of the Act.

7. Disparate enforcement of nonharassment policies

Paragraph 6(b) of the complaint alleges that since August 28, 2000, the Respondent has discriminatorily and disparately applied and enforced its nonharassment policy to employees at the Kingman facility. In substance, the General Counsel is alleging that the Respondent failed to take appropriate disciplinary action under its nonharassment policy against employee Mitch Bowman, who was known to be a union opponent. This deliberate inaction on the part of the Respondent is alleged to have worked to the detriment of union supporters Greg Lewis and Will Brooks, who sought the protection of the nonharassment policy.

The Respondent maintains non-harassment policies that prohibit employees from harassing other employees, including harassment due to an employee's religion or physical appearance. (See GC Exh. 14, the Respondent's harassment/inappropriate conduct policy; and GC Exh. 39, the Respondent's inappropriate behavior lesson.) It is undisputed that during the petition period, Lewis and Brooks made repeated complaints to management that Bowman was harassing them. All three men worked in the TLE and while Lewis and Brooks were open supporters of the Local Union, Bowman was known as an opponent. Although Bowman had originally been a supporter of the Local Union, he had changed his sympathies and become openly hostile to the organizing efforts. Vicky Dodson acknowledged that the Respondent knew of the particular sympathies of these three employees. Bowman himself certainly made no secret of his changed feelings, as he was reported by Greg Lewis as walking through the TLE shop singing, at the top of his lungs, "we don't need no fucking union."

In any event, Lewis and Brooks, complained repeatedly to management about alleged harassment from Bowman, following his conversion to that of an opponent of the Local Union. In October, Lewis, who testified that he was a minister, complained to Larry Eidson that Bowman had called him "lazy," told Lewis that he "hated Christians," called Lewis a "piece of shit," and pushed Lewis aside. Further, in response to a comment from Lewis that he had to prepare for a church service, Bowman responded, "[O]h, another goddamned religious function." After reporting Bowman's conduct to Eidson, Lewis learned that another employee, Everett Ford, had also reported these incidents to Eidson. Lewis also reported Bowman's conduct to Ragnar Guenther. Both Eidson and Guenther promised Lewis that they would take care of the problem. However, it continued.

On about October 24, Lewis and a fellow employee were engaged in a conversation about Lewis' church when Bowman approached and said, "[W]hat a bunch of bullshit" and "[L]et me get my hip boots." Will Brooks testified that during the same time period, Bowman approached Lewis and screamed in a derogatory tone, "Oh, God, take me home, bless me Lord." Bowman also called Lewis "fat boy." Lewis reported Bowman's behavior to Jay King, Jim Winkler, and Kirk Williams. However, according to Lewis, the managers just laughed at him. When he told the managers that Bowman's conduct had to stop, they told him that he "was making a bigger issue out of it than it was," and he should go back to work. Lewis returned to speak with the three managers a short time later, and he told them that he felt Bowman's conduct constituted "religious persecution," and that "fat jokes" were not appropriate. Allegedly, Kirk Williams responded that, "it's only words," and told him to go home if he was upset.

In late September, Brooks made a complaint to Guenther, charging Bowman with harassing him about his weight, as Bowman allegedly called Brooks "big boy" and "fat." Guenther made a comment to Brooks, which Brooks did not like, and Brooks then complained to Jay King about Guenther. In any event, Bowman's conduct towards Brooks continued when approximately 1 week later, Bowman approached Brooks and "started rubbing on [his] belly," while Brooks was eating a breakfast burrito. Bowman asked Brooks if he really needed to eat the burrito. Also, Bowman called Brooks' fiancée a "bitch," and threatened to hit her. Once again, Brooks complained to Guenther, who told him that he would look into the matter. However, the matter was not resolved and 4 or 5 days later, Bowman screamed that he couldn't believe that he worked "with a bunch of pussies," which comment Brooks believed was directed at him. Yet again, Brooks complained to Guenther, after which he was permitted to go home early because of the "stress."

I credit the testimony of Lewis and Brooks about the comments made to them by Bowman. Their testimony had "the ring of authenticity" to it, and was in conformity with the other record evidence. The Respondent does not deny that Bowman engaged in the conduct attributed to him, merely that the managers had insufficient evidence of that conduct to warrant taking disciplinary action against Bowman. According to Jay King and Ragnar Guenther, there was a severe personality conflict in the TLE and they chose to deal with it by getting the employees together and pointing out that the "bickering" had an adverse impact on performance and needed to end. They deny that the respective union sympathies of the employees involved had any thing to do with the decisions that they made in connection with the complaints against Bowman. This I do not believe.

As noted, the Respondent was well aware of the union sympathies of Brooks, Lewis, and Bowman. Vickie Dodson testified that during the election campaign, the Arkansas labor relations team kept a running account of whether or not each TLE employee was likely to support the Local Union. Further, during the campaign period, all personnel actions for TLE employees had to be cleared through the team. Therefore, it is clear to me that whether a TLE employee was prounion, or antiunion, was of paramount importance to the Respondent. As Bowman was clearly vigorously opposed to the Local Union, he was a vote in the scheduled election that the Respondent's managers believed they could depend on. Therefore, they had a vested interest in ensuring that he remained in the TLE and continued to view management in a favorable light. I believe that this was the reason why the Respondent took no significant disciplinary action against Bowman, despite considerable evidence that he was engaged in the harassment of fellow employees based on their religious beliefs and/or their physical appearance.

While the Respondent's witnesses indicated that Bowman denied making most of the offending remarks, it must have been clear to them, at a minimum, that he was engaged in at least some objectionable conduct. After all, employee Everett Ford had furnished evidence that supported Greg Lewis' complaint. The Respondent was in possession of a written statement from Ford which indicated that Bowman had in fact replied to Lewis' reference about having to prepare for a church meeting, with the statement, "another goddamn fuckin church." (R. Exh. 39, p. 17.) Apparently at least Guenther and Eidson knew of Ford's statement, which certainly buttressed the other complaints from Lewis and Brooks. Also, an employee whose first name was Misty had told Store Manager Jim Winkler that while she, Greg Lewis, and another employee named Debra were discussing religion, Bowman made the comment that "he needed his boots on." Winkler gave this information to Guenther, and Misty provided the Respondent with a written statement. (R. Exh. 39, p. 21.) Misty's statement further supported Lewis' complaint. Finally, Bowman himself admitted to Guenther that he asked Brooks whether Brooks needed "another burrito." Still, no significant disciplinary action was taken against Bowman.

Vicky Dodson testified that the complaints made regarding Bowman's conduct were brought to her attention, and it is clear from Guenther's testimony that she acquiesced in the decision not to issue a written reprimand to Bowman. According to Dodson, Wal-Mart takes complaints of harassment seriously, and she testified that the types of allegations that Lewis and Brooks complained of, namely statements about physical appearance and religious preference, would qualify as harassment. Nevertheless, Bowman was never written up for harassing either Brooks or Lewis.

Disparate treatment can be ascertained from the way in which the Respondent disciplined another employee before the union campaign was an issue. Several months before the petition was filed, Lewis had complained about another TLE employee, Jessie Buchanan, making inappropriate sexual comments about female customers and continually making "fat jokes." Ultimately, Buchanan was fired, and Store Manager Mike Buckner went to far as to apologize to Lewis on behalf of Wal-Mart for Buchanan's conduct. While the two situations are not identical, they demonstrate how much more seriously management took the matter of harassment prior to the petition. It is clear to the undersigned that what distinguished the Bowman situation from that of Buchanan was the Respondent's strong interest in keeping Bowman in the bargaining unit, so that his perceived vote against the Local Union would be available for the election.

It is a violation of the Act for an employer to fail to apply a personnel policy or benefit to an employee because of the employee's prounion sentiment, or fail to enforce a policy against an antiunion employee in a manner that works to the detriment of the employee who supports the union. That was precisely what the Respondent did when it refused to take significant disciplinary action against Bowman for harassing Lewis and Brooks. The two union supporters were not afforded the protection of the Respondent's nonharassment policy, because the Respondent was not willing to eliminate or antagonize its antiunion employee. See *Logan-Mingo Gas & Oil Co.,* 158 NLRB 721, 726 (1966) (disparate application of sick leave policy); and *Hillside Manor Care Center,* 297 NLRB No. 176 (1990) (not reported in Board volumes) (disparate grant of vacation requests).

A prima facie case has been established showing that Brooks' and Lewis' union activity and support, and Bowman's lack of support for the Local Union, was a motivating factor in the Respondent's decision to not enforce its nonharassment policies to protect Brooks and Lewis. *Wright Line,* 251 NLRB 1083 (1980). Clearly, the Respondent was aware of the prounion sentiments of Brooks and Lewis and the antiunion feelings of Bowman. Vicky Dodson acknowledged as much. The adverse consequences of the Respondent's failure to act against Bowman resulted in his continuing harassment of Brooks and Lewis. Of course, the timing of the Respondent's failure to act was highly suspect, occurring amid the election campaign. This was a campaign over which the Respondent was obviously utilizing maximum resources in an effort to defeat the Local Union.

In my view, the General Counsel having met its burden, the Respondent has failed to rebut the presumption that its actions, or lack thereof, occurred because of the election campaign. I simply do not credit the testimony of the Respondent's managers, including King and Guenther, that there was insufficient evidence to punish Bowman. To the contrary, as has been demonstrated above, there was more than amply evidence from neutral witnesses to support Brooks and Lewis, and their acquisitions. The Respondent's investigation disclosed much more than merely a "he said, she said" situation. The Respondent's failure to act decisively, as it had earlier against Buchanan, could only have been because it was very reluctant during the election campaign to do any thing that might cost the Respondent the vote of Mitch Bowman.

Accordingly, I conclude that the Respondent has discriminated against Brooks and Lewis by disparately applying and enforcing its nonharassment policies. As such, it has violated Section 8(a)(1) and (3) of the Act, as alleged in paragraph 6(b) of the complaint.

8. Increased work duties of Brad Jones and Larry Adams

Paragraph 6(c) of the complaint alleges that on February 28, 2002, the Respondent increased the work duties and tasks of its employees Brad Jones and Larry Adams because of their union activity. Jones and Adams held the positions of TLE writer/greeter. It is fairly clear that by January/February 2002, these two men were the only remaining open union supporters. Both men credibly testified that during this period they were wearing union pins on their uniforms. It is also clear that at about this same time, the Respondent initiated at the Kingman facility a customer service program called the "Red Cart Program," which would potentially create more work for the writer/greeter. However, I do not believe that management's intention in initiating the program was to increase the work duties and tasks of Jones and Adams because of their union activity.

TLE Manager Mike Wade and TLE District Manager Guenther both testified credibly that in February 2002, they created a program to improve and speed up service, which was called the "Red Cart Program" because the materials and tools used for the program were kept on a red cart. These included transmission fluid, power steering fluid, windshield washer fluid, a tire tread gauge, battery testing tools, and a vacuum cleaner. Customers purchased a 15-point service, which entitled them to the extra services from the materials and tools found on the cart. According to Guenther, approximately 70 percent of the customers at the stores in his district, where the program existed, paid for this extra service.

Guenther testified that he created and laminated a 15-point checklist and asked the greeters and technicians to check off each item as they performed it. (R. Ex. 31.) He credibly testified that everyone in the TLE was responsible to do these things, whenever it was convenient for them to do so. Specifically, he personally told Adams, Jones, TLE Manager Wade, and employees Hatfield and Carter that they were responsible for doing the service when they had the time. Service technicians Carter and Bettinger testified that they had both performed this extra work when time permitted, and had seen other employees do it as well.

Adams and Jones testified that they were approached by Mike Wade and told to start checking the lights, oil, transmission fluid, power steering fluid, air filter, and tire pressure. They contend that this was a change from the past practice, whereby the TLE greeter was expected to only greet the customer with a smile, find out what the customer needed, write the order, answer customer questions, and note any obvious damage to the vehicle. Jones complained to Wade that Larry Eidson, the former TLE manager, assured him that he would "not get dirty" as a greeter. Wade reminded Jones that Eidson was no longer at the facility. Although both Jones and Adams complained to him, Wade made it clear to them that they were only expected to perform the additional duties if they were not engaged in greeter responsibilities. When pressed by Wade, neither Jones nor Adams indicated they were refusing to perform the 15-point check.

Larry Eidson testified that at least until the time that he left Kingman in January 2002, it was the job of the greeter to help preservice cars by checking the air pressure, vacuuming the car, and cleaning the windshield. There is, of course, some dispute between the witnesses as to exactly how much physical work the greeter was expected to do prior to January/February 2002. However, I do not believe that it is necessary to decide that specific issue as, for purposes of the discussion, I will accept the contention of Jones and Adams that there was a change about this time in the greeter job to require more physical labor. In any event, I am still unconvinced that the "Red Cart Program" was created merely to give Jones and Adams more work as a punishment for their union support. To the contrary, I believe the program was created to better service the customers, which was after all why the TLE was in business.

It is too "machiavellian" for me to conclude that the Respondent's managers initiated the "red cart program" in an effort to increase the work duties of union supporters. I do not believe that the Respondent would go to this extreme. Further, it appears that the new 15-point service increased the work duties of the TLE employees generally, and not just the greeters. The employees' duties were increased because their efforts were needed to provide for the new service, which the Respondent was selling to customers.

Accordingly, I find that the General Counsel has failed to establish by a preponderance of the evidence that the Respondent increased the work duties and tasks of its employees Jones and Adams because of their union activity as alleged in paragraph 6(c) of the complaint. Therefore, I shall recommend that this paragraph of the complaint be dismissed.

9. The right to the presence of a coworker

It is alleged in paragraphs 5(r)(s)(t) and (u) of the complaint that on February 28, 2002, the Respondent threatened employee Brad Jones with unspecified reprisals if he did not waive his right to have a coworker present at an investigatory interview, which interview he had reasonable cause to believe would result in disciplinary action.[10] Further, it is alleged that Jones refused to attend the interview only after the Respondent denied his request to have a coworker present.

The Respondent's managers contend that they began an investigation of Brad Jones because they received a report from TLE employees alleging misconduct by Jones. Allegedly, TLE Manager Mike Wade passed on to Store Manager Van Horn and TLE District Manager Guenther reports from three employees that Jones had taken confidential documents off of Wal-Mart property. While it is never entirely certain just what documents Jones is accused of removing, it apparently is alleged by at least one of the employees to be TLE "bay system summary reports." These reports are generated automatically on a daily basis by the TLE computers. The reports list a myriad of information such as the work being performed, which employee is performing the task, and the length of time it takes to perform the task involved. Apparently, from a review of the reports, an individual employee can determine his relative speed and productivity in comparison to fellow employees.

The managers interviewed employee Connie Keel. According to Van Horn, Keel stated that she had seen Jones printing bay system summary reports. She did not claim to have any direct knowledge that Jones was taking documents off Wal-Mart property. Rather, she allegedly had heard from Larry Adams that Jones was taking papers off the property and giving them to the Local Union. A second employee, Bobbie Steeby, reported to the managers that she had allegedly seen Jones print the reports on more than one occasion, and, further, she claimed that Jones had used her password to gain access to the reports and print them. The third employee interviewed, Joe Bettinger, said that he had seen Jones take some reports outside the building and throw them into the garbage. The trashcan that he was referring to was, however, apparently still located on the Wal-Mart property. At the request of the managers, all three employees furnished Wal-Mart with written statements. (R. Exh. 35, 36, & 37.)

Guenther and Van Horn consulted with Vicky Dodson as to how the investigation should proceed. They received instructions and decided to meet with Larry Adams, who was the only person alleged to have direct knowledge of Jones removing confidential documents from the Respondent's property. Adams was called into Van Horn's office, told that "things" had been disappearing from the TLE, and asked by Guenther and Van Horn whether he knew anything about it. Adams said he did not, at which point the managers began to question him further. He proceeded to pull out a card from his pocket and said that he wanted to read them his "rights." Adams described this as a "Weingarden card," which he testified that he read to the managers. (GC Exh. 6.) In part, the document called upon the managers to permit him to have a coworker of his choice present. Van Horn informed Adams that his job was not in jeopardy and, therefore, the managers could still ask Adams questions. Further, Van Horn informed him that Wal-Mart took the position it did not have to comply with "*Weingarden*." Guenther explained to Adams that it was the Employer's policy that it had the right to deny him the presence of a coworker, as Wal-Mart was very concerned about "confidentiality," and respect for the individual. Adams still refused to answer any questions without the presence of a witness, and he added that the managers could either let him go back to work, or fire him. The interview ended, and Adams returned to work. He was not fired or disciplined.

Following the meeting with Adams, Jones was called into a meeting with Van Horn and Guenther. For the most part, Jones, Guenther, and Van Horn agree as to what was said at this meeting. Guenther informed Jones that they were investigating his possible removal of confidential documents from the store. At that point, Jones pulled out a card that contained a copy of what has been referred to as "*Weingarten*" rights. Jones read it word for word. (GC Exh. 6.) He then told the managers that he wanted to have Adams as his witness. Guenther replied that while he realized Jones had rights, Wal-Mart had a right to deny his request for a witness based on the Employer's policy, respect for the individual and confidentiality. Jones indicated that without a witness, he had nothing more to say. The managers asked him if he would give a written statement, which he also refused to do. He was told to return to work.

Later that day, Jones was again called to Van Horn's office. Guenther told Jones that, without his input, they would proceed on the information they had, which could lead to his termination. Jones again indicated that he would not talk with the managers without a witness present. Yet again, Van Horn and Guenther denied Jones the presence of a coworker, and he was told they would proceed without his cooperation. At that point, Guenther left the office, returned a few minutes later, and informed Jones that he was being terminated for removal of confidential documents from the Respondent's property.

It is well established that in a union represented bargaining unit, an employee has a right to union representation at an investigatory interview that the employee has a reasonable basis for believing may result in discipline. *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251 (1975). If an employee requests a union representative, the employer may grant the request, or carry on its inquiry without interviewing the employee, or give the employee the choice of continuing without representation. The right to have a union representative present is not applicable to an interview called merely to inform the employee of disciplinary action that has already been decided upon. *Baton Rouge Water Works Co.,* 246 NLRB 995 (1979); and *LIR-USA Mfg.*

[10] The language in complaint paragraph 5(u) is somewhat confusing in that it alleges that the Respondent threatened "employees" (plural) with unspecified reprisals. Besides Jones, the only other employee who could possibly be referred to in this paragraph would be Larry Adams, who the Respondent also attempted to interview on February 28. However, Adams is not named in the complaint, and neither counsel for the General Counsel nor counsel for the Charging Parties claim in their respective posthearing briefs that the Respondent's attempt to interview Adams constituted a violation of the Act. As this specific allegation is apparently not being made, I do not believe I am required to address it. Never the less, I will indicate that even if alleged, I would not find a violation as the evidence does not support a conclusion that the Respondent threatened Adams with unspecified reprisals for refusing to waive his right to have a coworker present during an investigatory interview. In the case of Adams, I do not believe either that he was threatened, or had reasonable cause to believe that the interview might result in disciplinary action.

*Co.,* 306 NLRB 298, 305 (1992). Recently, the Board concluded that, in a nonunion setting, employees were entitled to the same rights, enunciated by the Supreme Court in *J. Weingarten, Inc.,* as employees, who are represented by a union. *Epilepsy Foundation of Northeast Ohio,* 331 NLRB 676 (2000), enfd. in relevant part 268 F.3d. 1095 (D. C. Cir. 2001), cert. denied 536 U.S. 904 (2002).

It is undisputed that Guenther and Van Horn met twice with Jones on February 28, 2002, for the purpose of attempting to question him about his involvement in the alleged removal of documents from the Kingman facility. As such, the meetings were both clearly investigatory in nature, and Jones had the right under the existing case law to request the presence of a coworker. However, the Respondent had the right to decline to allow Jones to have a witness present, and instead to continue with the investigation in his absence, which is what the Respondent did the first time. It also had the right to conclude the investigation on the basis of the information available and award punishment, which was what the Respondent did the second time.

Once Jones asked to have Adams present during the first meeting on February 28, 2002, he was not asked further questions. He was given the option of providing a written statement, but when he refused to do so, he was informed that the meeting was over. When Guenther and Van Horn refused to allow Adams to be present, Jones had the choice between having the interview unaccompanied by Adams or having no interview and foregoing any benefit he may have derived from one. He chose the latter. This was no violation of his *Weingarten* rights.

During the second meeting that day, Jones was informed that without his cooperation, the managers would make a decision based on the available evidence. Jones again exercised his right not to answer questions without a witness, and the managers made no further request that he do so. He was then terminated, based on the information that had been gathered as of that point. *Weingarten* rights no longer attached to this meeting, as following Jones' last refusal to answer questions without a witness present, the meeting converted to one solely intended for the imposition of previously decided on discipline. *Baton Rouge Water Works Co.,* supra; and *LIR-USA Mfg. Co.,* supra.

In the next section of this decision, I will be discussing the evidence used as a basis to terminate Jones, and whether the Respondent's purported reasons for the discharge were pretextual. However, regardless of my ultimate conclusion regarding the discharge of Jones, I am of the opinion, for the reasons set forth above, that the Respondent's two meetings with Jones on February 28, 2002, did not constitute a violation of his right to have a coworker present during investigatory interviews. Accordingly, the General Counsel has failed to establish the allegations set forth in paragraphs 5(r)(s)(t) and (u) of the complaint. Therefore, I shall recommend that these paragraphs of the complaint be dismissed.

10. The discharge of Brad Jones

It is alleged in paragraph 6(d) of the complaint that on February 28, 2002, the Respondent discharged Brad Jones because of his union activity and support. Of course, the Respondent takes the position that it fired Jones because evidence was gathered establishing that he removed confidential documents from the facility. The Respondent denies that Jones' discharge was in any way based on his union activity.

Jones was hired as an alignment technician in the Kingman TLE in March 1996. On February 1, 2000, he became a service writer/greeter in the facility. There is no dispute that Jones was one of the more active union supporters during the organizational campaign. He testified that he was one of the TLE employees who first contacted the Local Union, signed an authorization card, met with the union official several times, and encouraged the filing of the representation petition. Jones' union sympathies were no secret, and Vicky Dodson acknowledged that she was aware that Jones, along with several other employees, was an open union supporter. Jones' union activities did not cease when the scheduled election was blocked by the unfair labor practice charges. To the contrary, he continued his open union support, testifying that in January 2002 he was one of only two TLE employees to wear union buttons. The other employee was Larry Adams.

As was noted earlier, former Assistant Manager Anthony Kuc testified on behalf of the General Counsel. Also as was mentioned, Kuc demonstrated some personal animosity towards the Respondent. He had been fired and testified that he was contemplating legal action against Wal-Mart, presumably for alleged unlawful discharge. However, despite Kuc's acknowledged hostility, I believe he testified in a generally credible manner, which was sometimes favorable to the Respondent. I closely observed his demeanor during what was an extensive cross-examination by counsel for the Respondent. He held up well under questioning. He seemed candid and believable. I got the sense that he was attempting to testify accurately, without exaggeration or embellishment. His testimony had the "ring of authenticity" about it, and I found it truthful.

According to Kuc, at a managers meeting in approximately September/October 2001, Store Manager Jim Winkler was making reference to the "prounion" employees who were "wearing their buttons and everything." Kuc testified that Winkler mentioned three TLE employees, Greg Lewis, Brad Jones, and one other, whose name Kuc could not recall. Allegedly, Winkler said that the managers would "follow the coaching process to a T" regarding "attendance and stuff," and that the union supporters would be held to a higher standard, by which they would "end up weeding themselves out." It is undisputed that the coaching process is the method by which the Respondent instructs, reprimands, and disciplines employees. Further, Kuc testified that at a managers meeting near the end of 2001, Jim Winkler mentioned that Brad Jones was the only original union supporter who was still employed by the Respondent. Allegedly, Winkler commented regarding Jones that "there was basically one more person to go, and he would screw up eventually, and he would be gone."

I am of the belief that Winkler made the statements attributed to him by Kuc. Winkler testified that he was aware that Jones was a union supporter. Of course, this was no surprise, as Jones was very open in his support for the Local Union. However, I do not credit Winkler's denial that at a managers meeting he ever discussed getting rid of union supporters, or weeding out union supporters by applying the attendance policy to a "T," or tripping up union card signers, or words to that effect. In my opinion, Winkler's denials have a "hollow ring" to them. Despite the fact that Winkler left the Kingman facility while Jones was still employed, and without having taken any action against Jones for attendance problems of any type, I believe that Winkler had every intention of discharging Jones because of his union activity, assuming the opportunity presented itself. Kuc's credible testimony leaves me with no other meaning for Winkler's statements.

Coincidentally, on February 26, 2002, 2 days before his discharge, Jones received his yearly performance appraisal. While Jones signed the appraisal on that date, Larry Eidson and Jeff Van Horn had signed their names on behalf of the Respondent on February 7, 2002. In any event, Jones was awarded a 4-percent annual salary increase. Also, a review of the appraisal shows that for most graded criteria, Jones was rated as "exceeds expectations," although his overall job performance was rated as "meets expectations." (GC Exh. 8.) Despite what was certainly a good appraisal, the Respondent did not hesitate to terminate Jones for what I believe was, at best, a very week claim that he removed documents from the facility.

The Respondent is apparently taking the position that it terminated Jones for the theft of company property, which is allegedly always a dischargeable offense, and because Jones was at the time on a "decision day." This term refers to an employee who has already received several warnings for infractions of the rules, and whose next infraction would result in discharge. (CP Exhs. 2, 3.) While it is not at all certain to me that Jones was on a "decision day," deciding this issue is really not essential, as the Respondent clearly alleges the theft of documents, which by itself resulted in his discharge.

I have already noted in the section above, the information that Guenther and Van Horn gathered from employees Joe Bettinger, Bobby Steeby, and Connie Keel. Following several telephone conversations between the managers and Vicky Dodson, and Jones' two appearances in the managers' office, Guenther informed Jones that he was discharging him "for theft of Wal-Mart property." Having consulted with Dodson several times, clearly Van Horn and Guenther did not take the decision to fire Jones lightly. They knew they were firing one of the last two union supporters.

Jones testified credibly about the events surrounding the accusation that he had removed Wal-Mart property from the facility. He was never told specifically what he allegedly removed from the facility, however, he assumed that he was being fired for removing TLE reports. He testified that he often generated such reports to track the times that it took for services to be completed and what was performed. The TLE reports provided helpful information regarding the time it took to perform specific services. Further, Jones testified that during the time Larry Eidson had been his TLE manager, he had printed the reports in the presence of Eidson, who had never reprimanded him for doing so. Nobody had ever asked Jones to refrain from printing the reports, and Eidson had, in fact, even asked Jones on occasion to print the reports.

There seemed to be some confusion at the hearing as to whether the TLE reports were printed automatically or not. While not entirely certain, it appears that the reports did print automatically on a daily basis. However, additional copies of the reports could apparently also be printed. Jones acknowledged printing these extra copies of the reports on occasion for his own review at the facility. He strongly denied ever removing copies of the reports from the Kingman facility. Also, he denied ever using any other employee's password to generate the reports, testifying that he used only his own password.

Will Brooks testified in support of Jones. According to Brooks, he had printed the TLE reports on occasion himself, was never instructed not to do so, and did so with the encouragement of managers. He testified that an employee could get access to the reports either by obtaining the automatically printed reports each morning, or by printing an extra copy by means of the employee's sign-on code.

Even the testimony of Larry Eidson was fairly favorable to Jones. While Eidson denied that he ever discussed the "tracking reports" with Jones or that he saw Jones checking the reports, he agreed that he had seen employees look at the information, and that there were legitimate reasons for employees, including Jones, to view the reports.[11] Of particular importance, Eidson testified that he believed Jones was trustworthy, and that he never had problems with his honesty.

Regarding the discharge of Brad Jones, the central issue before the undersigned is the question of the Respondent's motivation. In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB vs. Transportation Corp.,* 462 U.S. 393 (1983).

In the present case, I conclude that the General Counsel has made a prima facie showing that Brad Jones' union activity was a motivating factor in the Respondent's decision to terminate him. In *Tracker Marine, L.L.C.,* 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line,* supra*.* Under that framework, the General Counsel must establish four elements by a preponderance of the evidence. First, the Government must show the existence of activity protected by the Act. Second, the Government must prove that the respondent was aware that the

[11] There is some confusion in the record as reports from the TLE are variously referred to as "bay system summary reports," "TLE reports," just "reports," "tracking reports," and perhaps even by other names. However, the precise name of the report is unimportant, as what clearly is being referred to by the various witnesses are those reports from the TLE which record information about the nature of the work being performed, the volume of work, the speed of the work, and the employee performing the work.

employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the Government must establish a link, or nexus, between the employees' protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See also *Mano Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996); and *Farmer Brothers Co.,* 303 NLRB 638, 649 (1991).

There is no doubt that Brad Jones engaged in significant union activity. As noted earlier, he was one of the first employees to contact the Local Union, signed a union card, wore a union pin, and was vocal and open about his union sympathies. His union activity spanned the entire period under review, from the filing of the petition on August 28, 2000, until his discharge on February 28, 2002. Further, his activity did not wane, as he was only one of two employees wearing a union button in the last several months of his employment. There is, of course, also no doubt that the Respondent was well aware of Jones' union activity. Vicky Dodson acknowledged that she was aware he was in favor of the Local Union. Certainly if she was aware, so were all the Respondent's managers. The local managers and the Arkansas labor relations team discussed the union sympathies of the employees in the TLE on a daily basis during the period prior to the scheduled election. Dodson and others admitted as much. There can be no question that they discussed Jones' union support and activity. Of course, none of this was a secret, as Jones was completely open about his pro-union feelings.

Obviously, Brad Jones suffered an adverse employment action. He was discharged on February 28, 2002. He had been a long-term employee, having been employed at the Kingman facility since March 1996. All his employment had been within the TLE. It is somewhat ironic that only 2 days prior to his discharge, he had received a good yearly performance appraisal, which included a 4-percent salary increase.

Regarding the question of whether there exists a link or nexus between Jones' union activity and his discharge by the Respondent, I believe that the evidence overwhelmingly establishes such a connection. It is important to place the Jones discharge in the context of the overall election campaign. Since the day the petition was filed, the Respondent had been engaged in a high intensity effort to defeat the Local Union. A labor relations team had immediately been brought in from Arkansas and, thereafter, assumed total control of the campaign. The managers held daily meetings where they discussed strategy and the likely union sympathies of the employees. Meetings were frequently conducted for the employees, some storewide and some limited to the TLE, where the employees were inundated with information about why they should reject union representation. A number of antiunion videos were shown to employees, and various corporate officers, including even the Respondent's chief executive officer, were brought to the facility to speak to the employees about remaining nonunion.

This campaign was not simply some academic exercise on the part of the Respondent. The matter was obviously taken very seriously by the Respondent, and there is no doubt that the various managers exercised a maximum effort in an attempt to remain nonunion. In my view, the degree to which the Respondent conducted its election campaign demonstrated obvious animus towards the Local Union and its supporters. Animus or hostility towards an employee's union activity may be inferred from all the circumstances, even without direct evidence. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466 (9th Cir. 1966); and *U.S. Soil Conditioning Co.,* 235 NLRB 762 (1978). I believe that such an inference is warranted here. As I have noted, the Respondent engaged in a very aggressive campaign to defeat the Local Union's organizing efforts. While an employer certainly has the legal right to oppose a union's organizing efforts, by the extent and method of their efforts, this Respondent's managers made sure the employees understood that this was not simply business as usual.

In any event, there is also ample direct evidence of animus directed towards the Local Union, and union supporters, including Jones. I have already concluded that the Respondent engaged in various unfair labor practices during its election campaign. By way of review, I have found that Regional Personnel Manager Tim Scott engaged in unlawful surveillance of employees in the TLE during late August and early September 2000. Also, the Respondent granted employees in the TLE improved benefits and working conditions in the form of a repaired cooling system and new oil grates in an effort to interfere with their support for the Local Union. Further, I have concluded that the Respondent unlawfully threatened employees with a loss of merit raises if a collective-bargaining relationship were created. Finally, I have found that the Respondent disparately enforced its nonharassment policy to the detriment of two union supporters, namely Brooks and Lewis.

As for Jones, I have concluded that he had become a "marked man," in the sense that the Respondent's managers intended to remove him from the facility because of his union activity. As noted above, I have found that in September/October 2001, Store Manager Jim Winkler indicated at a managers meeting an intention of eliminating the three union supporters, including Jones, by holding them to a higher standard regarding attendance and other matters. Also, I have found that in late 2001, at another managers meeting, Winkler commented that Jones was the only one of the original union supporters left, and that he would "screw up eventually, and he would be gone." Having concluded that these statements were made by Winkler, I have no doubt that the Respondent's decision to discharge Jones in February 2002 was motivated, at least in large part, if not entirely, by the Respondent's antiunion considerations.

The General Counsel, having met its burden of establishing that the Respondent's actions were motivated, at least in part, by antiunion considerations, the burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community,* 330 NLRB 1100 (2000); and *Regal Recycling, Inc.,* 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vi-*

*talie Co.,* 310 NLRB 865, 871 (1993). The Respondent has failed to meet this burden.

It is the Respondent's position that Brad Jones was fired because its managers, specifically Guenther and Van Horn, had a "good-faith belief" that he had engaged in the theft of Wal-Mart property. Having set forth above the information the managers received about Jones from Connie Keel, Bobby Steeby, and Joe Bettinger, I will not repeat that information. However, it should be stressed that *none* of the three employees ever claimed to have witnessed Jones removing documents from Wal-Mart property. There was no "eyewitness" who had offered evidence that Jones was stealing the Employer's documents. The best the Respondent could do was to offer the statement of Connie Keel, who claimed that Larry Adams had told her that Jones was taking "papers," presumably bay summary reports, to the Local Union. (R. Exh. 35.) Of course, when Adams was asked by Guenther and Van Horn whether he knew anything about the removal of documents from the facility, he said he knew nothing, before refusing to answer further without a witness.

In reality, the decision was made to discharge Jones based merely on statements from three employees that they had seen him with documents from the TLE, while he was still on Wal-Mart property. Further, these were documents which the evidence shows were available to any TLE employee who cared to look at them. There was no probative evidence offered to establish that it was a violation of some rule of conduct for Jones to have the purported documents in his possession at the facility. From the totality of the evidence, it appears that there was nothing unusual about a TLE employee viewing, or even printing, one of these documents.

The standard used by the Respondent in deciding to terminate Jones was far different from the standard the Respondent used in other cases where employees were discharged for stealing from Wal-Mart. In those other cases, records admitted into evidence show that the Respondent had some concrete proof of theft such as eyewitness statements describing the theft, corroborative eyewitness statements, or admissions of guilt. Also, in those other cases, the Respondent was able to identify the product or item allegedly stolen. (R. Exh. 33.) In Jones' case, besides the lack of any witness to a theft, the Respondent could not even say what specific documents were allegedly stolen, or whether any documents were even stolen at all. Also, none of the other cases offered for comparison involved the theft of "documents," of any kind.

What could have possibly induced the Respondent's managers, on the basis of some rather weak evidence, to fire a long-term employee who had only 2 days earlier received a good annual appraisal? In my view, it could have only been the Respondent's desire to be rid of this longtime union supporter. Jim Winkler's remarks of several months earlier had set forth the Respondent's intention to fire Jones, one of the last union supporters, when the opportunity presented itself. The Respondent was apparently ready on February 28, 2002, and really was not very concerned with whether the "evidence" it gathered against Jones made much sense or not. In my opinion, based on the "flimsiness" of the evidence, there was no way Guenther and Van Horn had a "good-faith" belief that Jones had removed confidential documents from the facility. I find the Respondent's stated explanation for discharging Jones to constitute a transparent pretext. Accordingly, the Respondent has failed to rebut the General Counsel's prima facie case by any standard of evidence. It is, therefore, appropriate to infer that the Respondent's true motive was unlawful, that being because of Jones' union activity. *Williams Contracting, Inc.,* 309 NLRB 433 (1992); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982); and *Shattuck Denn Mining Corp. v. NLRB,* 326 F.2d 466, 470 (9th Cir. 1966).

Accordingly, I find and conclude that the Respondent has violated Section 8(a)(1) and (3) of the Act by discharging Brad Jones on February 28, 2002, as alleged in paragraph 6(d) of the complaint.[12]

11. Denial of COBRA benefits

Paragraph 6(e) of the complaint alleges that since February 28, 2002, the Respondent has denied Brad Jones COBRA[13] coverage as a result of his activity on behalf of the Local Union. The Respondent admits that Jones did not receive COBRA benefits, but argues that he was not eligible for these benefits because he was discharged for "gross misconduct," namely the theft of Wal-Mart property.

It is not in dispute that at the time of his termination, Guenther informed Jones that he was not eligible to receive COBRA benefits, which, thereafter, he did not receive. Sherri Quinn, who had been the Kingman facility personnel manager, testified that Jones called her to ask about COBRA benefits after he was fired. She told Jones that he was not eligible for the benefits because his exit interview form showed that he was terminated for gross misconduct. Guenther had filled out the exit interview form, not Quinn. (GC Exh. 7.) Quinn testified that the back of the exit interview form states that gross misconduct includes "any issue related to theft . . . or misappropriation of company funds or assets." (R. Exh. 1.) She was also aware that the Respondent's benefits handbook contained similar language, which disqualified an employee terminated for gross misconduct from eligibility for COBRA benefits. (R. Exh. 20.) Quinn testified that she treated Jones just as she had other employees who had also been fired for gross misconduct.

I have concluded that the Respondent's discharge of Jones constituted a violation of the Act. Concomitantly, the Respondent's characterization of Jones' actions as gross misconduct, which disqualified him from COBRA benefits, was also a violation of the Act. In reality, the Respondent did two things in

[12] I specifically do not find that the Respondent took any adverse employment action against Jones because he insisted on having a co-worker present during an investigatory interview, as alleged in the complaint. Therefore, I shall recommend the dismissal of par. 6(g) of the complaint.

[13] The Consolidated Omnibus Budget Reconciliation Act of 1986 provides that employees, former employees, and qualified dependents may elect to continue the health care benefits provided by an employer for a maximum of 18 months. The employee or qualified beneficiary must pay for these benefits him/her self. In addition, the employee, etc., only becomes eligible upon the happening of a qualifying event. The employee's termination constitutes a qualifying event, except when the termination is by reason of the employees "gross misconduct." See 29 U.S.C. §. 1161 to §. 1166.

retaliation for Jones' union activity, namely terminate him and deny him COBRA benefits. Both actions were violative of the Act.

As I have noted above, I do not believe that the Respondent's managers exercised "good faith" when they terminated Jones. To the contrary, I am convinced that the alleged theft of the Employer's property was merely a pretext for their true motive, that being retaliation for Jones' union activity. The actual basis for the discharge being unlawful, the Respondent can not now claim that it stands with "clean hands," and should some how be excused from denying COBRA benefits, because there was some evidence of document theft. Whatever minimal "evidence" of document theft that the Respondent may have received from the three employee sources was irrelevant to the managers, as the Respondent's primary motive was retaliation for Jones' union activity. But for his union activity, there would have been no discharge and no denial of COBRA benefits. The Respondent simply cannot categorize Jones' action as gross misconduct. To deny him COBRA benefits for that reason is an independent violation of the Act. (The case authority cited in the last section under the *Wright Line* analysis is appropriate as well for the denial of COBRA benefits.)

Accordingly, I conclude that the Respondent violated Section 8(a)(1) and (3) of the Act when it denied Jones COBRA coverage, as alleged in paragraph 6(e) of the complaint.

### 12. Benefits book eligibility language

It is alleged in paragraph 5(a) of the complaint that since October 23, 2000, the Respondent, at all of its stores throughout the United States, has maintained a provision in its Associate Benefits Books as follows:

> If you are a leased employee, non-resident alien, independent contractor or consultant or are not treated as an employee of Wal-Mart Stores, Inc. and its participating subsidiaries, you are not eligible for coverage regardless of whether you are later determined by a court or any governmental agency to be, or to have been common law employee of Wal-Mart Stores, Inc. or any participating subsidiary. <u>Contractually excluded and certain other union represented associates are not eligible for coverage</u>. [Underlining has been added for emphasis by me.]

The General Counsel contends that by this provision denying eligibility for benefits to union represented employees, the Respondent is interfering with and restraining employees in the exercise of their Section 7 rights. It is the Respondent's position that the quoted language is nothing more than an expression of the possibility that where a unit of employees is represented by a labor organization, those employees may not be eligible for the same benefits as the unrepresented employees. According to the Respondent, the language puts those employees contemplating union representation on notice that the Wal-Mart benefits might be "contractually excluded." The Respondent denies that there is anything coercive about this language.

The Respondent's associate benefits books, effective January 2001 (GC Exh. 27) and effective January 2002 (GC Exh. 28) both contain the above quoted language.[14] Earlier benefits books apparently did not contain this language as it related to unions. There was no evidence offered at the hearing to explain why the Respondent adopted this language at the time it did. The parties stipulated at the hearing that from January 1, 1999, to the hearing date, Wal-Mart did not have any bargaining unit that was certified by the Board, and enforced by the courts, or recognized by the Employer at any of its stores in the United States. Further, the stipulation provided that during the same period, Wal-Mart had not employed any employees covered by a collective-bargaining agreement between the Employer and any union in the United States. (GC Exh. 25.) The parties entered into another stipulation by which the Respondent acknowledged that it had distributed its associate benefits books (those effective January 2000, 2001, and 2002, respectively) to thousands of its employees nationwide. Further, the Respondent stipulated that it was its intention to distribute the benefits books to all its eligible employees nationwide, although Wal-Mart could not be certain that every such employee had received a copy. (GC Exh. 35.)

I am in agreement with counsel for the General Counsel and counsel for the Charging Parties that the maintenance of the language in question and its distribution in two associate benefits books, nationwide to thousands of employees,[15] could have no legitimate purpose. Its only purpose could have been to coerce employees in the exercise of their Section 7 rights. The Board has long held that an employer commits an 8(a)(1) violation by maintaining, promulgating, or publicizing a pension or benefit rule which purports to exclude members of a bargaining unit or those covered by a collective-bargaining agreement. *Niagara Wires,* 240 NLRB 1326, 1327 (1979). Any language that "suggests that coverage of employees will automatically be withdrawn as soon as they become represented by a union or that continued coverage under the plan will not be subject to bargaining" is coercive. *Lynn-Edwards Corp.,* 209 NLRB 202, 205, 208–209 (1988) (unlawful for profit sharing plan to restrict eligibility to all full time employees "except those covered by collective-bargaining agreements"). See also *VOCA Corp.,* 329 NLRB 591 (1999) (unlawful to restrict eligibility to any employee who is "not a member of a collective bargaining unit," and unlawful to deny benefits to any employee who "changes to a bargaining unit job"); and *Alaska Pulp,* 300 NLRB 232, 243–244 (1990), enfd. mem. 972 F.2d 1341 (9th Cir. 1992) (unlawful for disability policy to restrict eligibility to "active, full-time hourly nonunion employee[s]").

The Board has held that an employer violates the Act by maintaining a benefit plan that excludes employees who join a union, or choose union representation, or are members of a bargaining unit, or are covered by a collective-bargaining agreement. Such restrictions "constitute threats to discontinue

[14] The provision in the 2002 book also contains some unrelated language concerning employees considered "temporary."

[15] In fact, it is possible that hundreds of thousands of employees may have seen the offending language. There were repeated references at the hearing to the Respondent being the largest retail chain of stores in the United States, with approximately 1 million employees located nationwide. The benefits books were apparently distributed to employees throughout the Respondent's nationwide system.

the benefits or refuse to bargain over continuation of the benefits." *Handleman Co.,* 283 NLRB 451, 452 (1987). Further, such restrictions have been held to be coercive of Section 7 rights without regard to the employer's motivation or whether the employer has actually applied the restriction. *Niagara Wires,* supra at 1327–1328. Also see *Hill Park Health Care Center,* 334 NLRB 328 (2001) (posted document entitled "Benefits for Non-Union Employees," violates the Act because it restricts eligibility to nonunion employees and, thus, "has the inherent effect of interfering with the employees' Section 7 rights").

Counsel for the Respondent argues in his posthearing brief that Wal-Mart's benefits books provision is lawful as it does not automatically exclude all represented associates, it excludes only those represented associates whose contract provides that they are not covered under the plan or are subject to "certain other" constraints. Counsel cites *KEZI, Inc.,* 300 NLRB 594, 595 (1990), for the proposition that plan language notifying employees they may be excluded through bargaining, but not simply through the selection of a representative, is lawful. According to counsel, the language in question merely puts those employees who are "contemplating union representation" on notice that "standard" Wal-Mart benefits are subject to the outcome of contract negotiations, and that, therefore, the benefits might be "contractually excluded." Counsel denies that the language in any way suggests that represented employees would automatically lose benefits by electing a union or would lose benefits during negotiations.

To begin with, it is important to recall that, as stipulated by the parties, the Respondent has no represented employees, and has had none during the period that the language in question has been in effect. Therefore, the Respondent is really "warning" its employees about, at most, a contingency. In fact, there are no "contractually excluded" nor "certain other union represented associates." So, what is the Respondent really saying? I believe that it is a not very subtle threat to its employees that something unpleasant will happen to them if they organize, namely the loss of the company benefits. The Respondent has certainly not attempted to explain to its employees in its benefits books the role that the collective-bargaining process could play in the determination of whether employees are eligible for benefits or not. To simply offer the existing language as a contingency leaves any reasonable employee with the clear impression that being represented by a union will likely result in a loss of benefits. In the case of *Hertz Co.,* 316 NLRB 672 fn. 2 (1995), the Board upheld an administrative law judge's finding that although employees were told that benefit eligibility was negotiable, the employer's assurance could not dispel the impermissible suggestion that there would be an automatic loss of benefits. The language was such that reasonable employees could still assume that an automatic loss of benefits was a possibility.

Further, any imprecise explanation of such a provision should be held against the Respondent. *Fabric Warehouse,* 294 NLRB 189 (1989). The Respondent's use of the language "certain other union represented associates," is totally confusing. The Respondent does not attempt to clarify who these associates may be, or how they are different than "contractually excluded" associates, which tends to leave employees with the impression that some union represented employees will not be eligible for benefits prior to a bargaining representative negotiating a contract. As the Respondent has created this confusion, it should be responsible for remedying the problem.

Had it chosen to do so, the Respondent could have created language which would have made it clear that union represented employees' benefits would be subject to good-faith negotiations, or that the Respondent's plan would not cover them because collective bargaining had provided them with other benefit programs. Such language would have been perfectly acceptable. *Handleman Co.,* supra. However, the Respondent did not do so. Instead, the Respondent crafted language that was confusing, and certainly did not reassure employees that mere union representation would not result in ineligibility. What else could this clause have been intended to do, but to threaten employees, who were naturally unsophisticated in the nuances of labor relations, with a loss of benefits for exercising their Section 7 rights? Although it is not essential to establish motivation, I am convinced that the Respondent intentionally selected the specific language it did to ensure, to the extent it could, that its employees were fearful of losing their benefits, and, thus, continued to reject union representation.[16]

Accordingly, I conclude that the language as alleged in paragraph 5(a) of the complaint, which the Respondent has maintained and distributed in its associate benefits books since January 2001, has violated Section 8(a)(1) of the Act.

Based on the parties' stipulations, it is clear that the Respondent distributed its benefits books, containing the language in question, to its employees at its various retail stores nationwide. Therefore, in order to remedy the violation of the Act that I have found, the Respondent must be ordered to post an appropriate notice at all those individual retail stores where employees received the benefits books that contained the unlawful language.[17] The notice will provide for the rescission of the offending language.

### 13. Summary

As is reflected above, I recommend dismissal of the following paragraphs of the complaint: 5(b), (c), (d), (f), (g), (h), (i)(1), (3), (4), and (6), (k), (l), (m)(1) and (2), (n), (p)(1) and (2), (q), (r), (s), (t), (u), (v)(1) and (2); and 6(c) and (g).

Further, I find that the Respondent has violated Section 8(a)(1) of the Act as alleged in paragraphs 5(a), (e), (i)(2), (5), and (w) of the complaint. Also, I find that the Respondent has violated Section 8(a)(1) and (3) of the Act as alleged in paragraphs 6(b), (d), and (e) of the complaint.

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[16] While I conclude that the mere existence of the language in question is unlawful, it is worth noting that the timing of the clause is highly suspect. The new eligibility language was added in the January 2001 benefits books. This was shortly after the petition was filed covering the Kingman TLE, and, according to various references at the hearing, at approximately the same time the International Union was engaged in organizing efforts at a number of the Respondent's facilities.

[17] See *Kinder-Care Learning Centers,* 299 NLRB 1171, 1171 and fn. 1, 1176(1990); *La Quinta Motor Inns,* 293 NLRB 57, 57, 62, (1989). See also *Raley's Inc.,* 311 NLRB 1244, 1244 fn. 2, 1252 (1993).

Paragraphs 5(j)(1) and (2) and 6(a) of the complaint were withdrawn at the hearing. In his posthearing brief, counsel for the General Counsel seeks permission to withdraw paragraph 5(o) of the complaint. I grant that motion.

## CONCLUSIONS OF LAW

1. The Respondent, Wal-Mart Stores, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Local Union, United Food and Commercial Workers Union, Local Union 99R, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The International Union, United Food and Commercial Workers International Union, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

4. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act.

(a) Promulgating, maintaining and distributing in its employee benefits books a clause which threatened employees who supported the Local Union, or any labor organization, with loss of their company benefits.

(b) Engaging in surveillance, or creating an impression of surveillance, of its employees' union and other concerted activities.

(c) Granting benefits and improved working conditions in order to discourage its employees from supporting the Local Union.

(d) Threatening its employees with a loss of merit raises for supporting the Local Union.

5. By the following acts and conduct the Respondent has violated Section 8(a)(1) and (3) of the Act.

(a) Discriminatorily and disparately applying and enforcing its nonharassment policies to the detriment of employees who supported the Local Union.

(b) Discharging its employee Brad Jones.

(c) Denying its employee Brad Jones COBRA coverage.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not committed the other violations of law that are alleged in paragraphs 5(b), (c), (d), (f), (g), (h), (i)(1), (3), (4), and (6), (k), (l), (m)(1) and (2), (n), (p)(1) and (2), (q), (r), (s), (t), (u), (v)(1) and (2); and 6(c) and (g) of the complaint.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[18]

The Respondent must amend its employee benefits books, and any similar publications, to rescind the clause which excludes union-represented employees from benefit eligibility, unless it makes it clear that the union-represented employees' benefits are provided for through the collective-bargaining process, and that union-represented employees will remain eligible for benefits during bargaining.

The Respondent shall apply and enforce its nonharassment policies in a fair and impartial manner so as not to discriminate to the detriment of supporters of the Local Union.

The Respondent having discriminatorily discharged its employee Brad Jones, my recommended order requires the Respondent to offer him immediate reinstatement to his former position, displacing if necessary any replacement, or if his position no longer exists, to a substantially equivalent position, without loss of seniority and other privileges. My recommended order further requires the Respondent to make Jones whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date the Respondent makes a proper offer of reinstatement to him, less any net interim earnings as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

The Respondent having discriminatorily denied Jones COBRA benefits at the time of his discharge, my recommended order also requires the Respondent to make Jones whole for any out of pocket medical expenses and costs he may have incurred as a result be being unlawfully denied medical insurance coverage. This shall include interest as computed in *New Horizons,* supra.

The recommended order further requires the Respondent to expunge from its records any reference to the discharge of Jones, and to provide him with written notice of such expunction, and inform him that the unlawful conduct will not be used as a basis for further personnel actions against him. *Sterling Sugars, Inc.,* 261 NLRB 472 (1982). Further, the Respondent must not make reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against Jones in any other way. Finally, the Respondent shall be required to post a notice that assures the employees that it will respect their rights under the Act.[19]

[Recommended Order omitted from publication.]

*Paul Irving, Esq.,* for the General Counsel.
*Steven D. Wheeless, Esq*., of Phoenix, Arizona, for the Respondent.
*David Rosenfeld, Esq.* and *Caren P. Sencer, Esq.,* of Alameda, California, for the Charging Parties.

[18] In its complaint, the General Counsel requests as part of the remedy, an order requiring the Respondent's corporate officers found to have committed unfair labor practices to, "on an individually-named basis," cease and desist from engaging in such unlawful conduct. This I decline to do. While the unfair labor practices found to have been committed are serious violations of the law, they do not require the kind of extraordinary remedy requested by the General Counsel. The standard order and notice utilized by the Board should be adequate to remedy the violations of the Act committed by the Respondent.

[19] Specifically, the Respondent shall be required to post two separate notices. One notice shall be posted at the Kingman facility, which will deal with the unfair labor practices committed at that location only. A separate notice shall be posted at the Respondent's other facilities nationwide where employees received copies of the Respondent's employee benefits books for the years 2001 or 2002.

## SUPPLEMENTAL DECISION

### STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. On February 28, 2003, following a 13-day hearing, I issued a decision in the above-captioned matters. In that decision, I found that Wal-Mart Stores, Inc. (the Respondent, the Employer, or Wal-Mart) had, by it actions, violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), as alleged in certain paragraphs of a consolidated complaint issued by the Regional Director for Region 28 of the National Labor Relations Board (the Board). I recommended to the Board that Wal-Mart be required to take certain remedial and other action in order to remedy its unfair labor practices. I also found that Wal-Mart had not violated the Act as alleged in other paragraphs of the complaint, and recommended that those portions of the complaint be dismissed. Both the General Counsel and Wal-Mart filed timely exceptions with the Board to my decision. However, no exceptions were filed by the United Food and Commercial Workers Union, Local Union 99R, CLC or by the United Food and Commercial Workers International Union, CLC, the Charging Parties in these matters (the Charging Parties or the Unions).

In an Order Severing and Remanding and Notice to Show Cause issued on July 6, 2005, the Board, among other actions, granted a motion by counsel for the General Counsel and severed Case 28–CA–17141 from the other charges in the consolidated complaint that were heard at trial.[1] Further, the Board's Order directed the parties to address the issue of whether the Respondent's production of certain documents and files in an unrelated state court proceeding should not be found to constitute a waiver of the attorney-client privilege.

In my original decision in this case, I found that certain documents maintained by the Respondent and referred to as the "remedy system" documents were protected from disclosure through a subpoena duces tecum as attorney-client privileged information. During the trial, I orally granted a motion from the Respondent and revoked in part subpoenas issued on behalf of the General Counsel and Charging Parties seeking remedy system documents. Thereafter, I reiterated that ruling in writing in my original decision. As one of his exceptions to the Board, counsel for the General Counsel challenged my ruling as to the attorney-client privilege.

In an Order Remanding dated September 29, 2006, the Board addressed the attorney-client privilege issue. *Wal-Mart Stores, Inc.,* 348 NLRB 833 (2006). The Board concluded that it was "unnecessary for [it] to decide whether [my] ruling was correct," because by its actions in the State court proceeding [that being its production of the remedy system documents], the Respondent [could] no longer assert the privilege that it once claimed over the Remedy system documents. . . ."

The Board, having found that the attorney-client privilege was "waived," concluded that it was "entirely possible that the [remedy system] documents and files contain information relevant to the exceptions that the General Counsel and the Respondent filed with the Board." Accordingly, the Board reversed my ruling quashing the subpoenas, and remanded this proceeding to the undersigned "to reopen the record to receive relevant evidence and make findings with respect thereto . . . and tak[e] further appropriate action."

### Supplemental Evidence

Pursuant to the Board's Remand Order, I conducted a supplemental hearing in this case in Phoenix, Arizona, on November 30, 2006, and February 1, 2007. All parties appeared at the supplemental hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Charging Parties, and counsel for the Respondent, and my observation of the demeanor of the witnesses,[2] I now make the following findings of fact and conclusions of law.[3]

#### I. THE SUBPOENAED REMEDY SYSTEM DOCUMENTS

#### *A. Compliance with the Subpoena*

As was set forth in my original decision in this case, at the time of the events in question, the Employer utilized a "union hotline" system. This system was established so that managers throughout the country can report union activity to headquarters and, in return, receive guidance from labor relations specialists and legal advice from the Employer's legal team, both in-house and outside counsel. The flow of information back to store managers is referred to as the "remedy system." (See p. 5, fn. 4 of ALJD.)

At the reopened hearing, I ordered the Employer to produce remedy system documents for the period of January 1, 2000 through September 13, 2002, which were in any way related to the Charging Parties' union campaign or the union activity of any of Wal-Mart's employees at the Employer's store in Kingman, Arizona. Further, I directed the Employer to produce an appropriate employee, who could testify regarding the efforts to gather these documents, and the sources from which they were obtained. Also, I directed the Employer to produce a witness who could testify substantively about the information contained in the remedy system documents.

Initially, when the parties discussed this issue, it was contemplated that the Employer would produce an employee from its information technology (IT) department, who could testify as to the efforts to gather the documents and the sources from

[1] At the supplemental hearing, I granted counsel for the General Counsel's motion, opposed by counsel for the Charging Parties, to remove Case 28–CA–17141 from the combined caption of these matters, as the Board had severed that case from the others remaining before me.

[2] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

[3] Counsel for the General Counsel's unopposed Motion to Correct the Record is hereby granted. The record is corrected as is reflected in said motion, which is admitted into evidence as GC Exh. 57.

which they were obtained. Further, the Employer indicated that the best witness to testify substantively about the documents was Vicky Dodson, currently a director of human resources for the Employer, who had testified at length at the original hearing about the events surrounding the organizational campaign.

However, the Employer did not produce an employee from its IT department. Rather, it offered the testimony of Cathy Davis, employed as a paralegal with the Employer's employment division. Davis had been given the assignment of gathering the subpoenaed remedy system documents. She testified at length under examination by counsel for the General Counsel and to a lesser extent by counsel for the Unions and counsel for the Employer about her efforts to locate and assemble the subpoenaed documents. In my opinion, these efforts can only be described as exhaustive.

Davis testified that the remedy system documents are created and maintained in an electronic database known as the "infotrac." She queried that database for all Kingman related remedy system reports for the relevant time period and produced all such records. They were admitted into evidence as General Counsel Exhibit 50, consisting of 84 pages. In an effort to locate any other related relevant documents, she interviewed 15 individuals who had been employed by the Employer in the labor relations department during the time period in question. She asked them to search their individual computer hard drives and their individual hard-copy files for any relevant documents. Davis testified that she personally reviewed over "ten thousand" documents on the Employer's labor relations general electronic server and produced all responsive documents.

As testified to by Davis, in May of 2005, the FBI and the U.S. Attorney, apparently pursuant to a subpoena in a criminal case, removed all the hard-copy labor relations files from the Employer's labor relations library. Therefore, those files were no longer available for Davis to search.[4] In any event, she testified that over 40 hours of her time were devoted to the search for the subpoenaed documents. In all, she was able to produce a significant number of documents, which consisted of not only the remedy system documents themselves, but also summaries of those documents. (GC Exhs. 50–55.)

I found Davis to be a conscientious, credible witness. She clearly made an exhaustive search for any remedy system and related records connected with the organizing campaign for the period of time in question. Her credibility was not seriously challenged by any party, and there was absolutely no basis for concluding other than her testimony was credible.

While counsel for the General Counsel does not challenge Davis' credibility, he strenuously questions the adequacy of the Employer's production of remedy system documents. He is of the belief that Davis was not competent to make an adequate search for the subpoenaed documents, and that instead of Davis, a more "appropriate employee" from the IT department should have been produced, as "custodian" of the documents. It is his position that the Employer has not fully complied with the subpoena and that, therefore, the hearing should be reopened for the testimony of a "competent" witness regarding the production of the remedy system documents. Further, he requests that the undersigned order the production of the subpoenaed documents in "electronic format," as that is how they are apparently stored.

The production of records pursuant to any subpoena duces tecum naturally requires that the records be accompanied by a competent witness, who can testify about the gathering of the records, as obviously, the records cannot speak for themselves. Such an individual is frequently referred to as the "custodian" of the documents. However, in fact the person who accompanies the records is rarely the physical custodian of the documents. I am unaware of any case authority as would require the party whose records are subpoenaed to produce the "most" knowledgeable person possible. An employer must, of course, make a good-faith effort to comply with the subpoena. I am convinced that this Employer has done so.

In fact, Davis may have been the most appropriate person to have accompanied the records. She is an intelligent, articulate paralegal, who spent in excess of one full workweek searching for and gathering the subpoenaed records. Even assuming for arguments sake that she was not initially knowledgeable about the remedy system and related documents when she was first assigned the job of locating the subpoenaed records, she was undoubtedly extremely knowledgeable when she completed the task. Contrary to the arguments of counsel for the General Counsel, there is no evidence that any employee in the IT department would have been more knowledgeable or more appropriate as a witness than Davis.

There is no requirement that a subpoenaed party produce records in an electronic format, even if the documents were stored in such a fashion. The Employer has produced the remedy system and related records in printed hard-copy form. Under the circumstances, this is certainly reasonable. Counsel for the General Counsel apparently wants to see the records in an electronic format because he is skeptical that the Employer is fully complying with the subpoena. Counsel's skepticism may never be satisfied when it comes to this Employer. In any event, satisfying counsel's skepticism is not the standard required. What is required is that the Employer has made a good-faith effort to comply with the subpoena and, in fact, be in substantial compliance with the subpoena, to the extent that is possible. Having heard Davis' testimony, and well as that of the subsequent witness Vicky Dodson, I am of the view that the Employer has done so.

Accordingly, I am reiterating the ruling that I made at the supplemental hearing, and I am declining to reopen the hearing yet again for the purpose of requiring the Employer to produce an employee of its IT department and/or to require the Employer to produce the subpoenaed documents in an electronic format. I find that the Employer has complied with the subpoena to the extent required by the Board's Order Remanding.

### *B. Contents of the Subpoenaed Documents*

As noted above, Vicky Dodson testified substantively about the contents of the remedy system and related documents. She

[4] In his posthearing brief, counsel for the Unions requested that the hearing be continued until such time as the files subpoenaed and removed by the FBI and U.S. Attorney could be returned to the Employer and, as relevant, produced for this proceeding. I will address counsel's request later in this decision.

testified at length under examination by counsel for the General Counsel, and briefly under questioning by counsel for the Unions. At the original hearing in this case, I found Dodson to be an intelligent, articulate, sophisticated individual, who was a well-trained labor relations professional. (See p. 10 of ALJD.) As I did at the earlier hearing, I continue to find her credible. She is a sincere, thoughtful witness who testifies candidly and truthfully without trying to embellish or exaggerate on behalf of her employer.

I have carefully reviewed each page of the subpoenaed remedy system and related documents. (GC Exhs. 50–55.) For the most part, the remedy system documents were daily reports from Dodson or other members of her labor relations team from Arkansas or to a lesser extent other management representatives, made to the Employer's headquarters in Arkansas. As was represented by the Employer at the original hearing, the contents of these documents involved the Employer's efforts to defeat the Unions' organizing campaign. There were frequent references to various employees and their sympathies, either pro or antiunion. However, rarely were employee names used, but rather descriptions such as what department they worked in or some other personal information were used as references. The remedy system documents specifically portray the Employer's efforts to convince its employees in the Kingman, Arizona store that they do not need union representation. While the Employer's efforts are directed primarily towards the employees in the petitioned for TLE[5] unit, there were also efforts made at various times to influence the store employees in general.[6] Various management representatives, including Kingman store, regional, and headquarters' employees are specifically named and their individual efforts to defeat the Unions are documented.

In general, I found the subpoenaed documents to be "anticlimatic." I saw nothing new or particularly revealing in the many pages of documents. While counsel for the General Counsel would likely argue that this must mean that the Employer is hiding more revealing documents, I conclude nothing of the sort. The documents are what they purport to be, and nothing more. I see no "smoking gun," as there are no expressed, overt, documented unfair labor practices in the many pages of subpoenaed records. Frankly, after reviewing the remedy system and related documents several times, I am left with the impression that all the efforts on the part of the General Counsel to obtain these documents and the efforts in opposition by the Employer have amounted to "Much Ado About Nothing."[7] As to any implied references to unfair labor practices in the documents, the parties were free to argue such contentions in their respective posthearing briefs.

### *C. The Subpoenaed Documents and the Outstanding Exceptions to the ALJ's Decision*

The General Counsel and the Employer filed timely exceptions to my original decision in this case. The Unions, however, filed no exceptions. The General Counsel's one substantive exception concerned my conclusion that the transfer of Kingman Store Manager Mike Buckner was not made in response to employee complaints or to improve their working conditions in an effort to influence their votes.[8] I dismissed this complaint allegation.

The Employer's remaining five exceptions concerned my finding that it had violated the Act by: (1) engaging in surveillance of its employees' union activity, (2) granting benefits and improved working conditions in order to discourage its employees from supporting the Local Union, (3) threatening its employees with a loss of merit raises for supporting the Local Union, (4) discriminatorily and disparately applying and enforcing its nonharassment policies to the detriment of employees who supported the Local Union, and (5) discharging and denying COBRA benefits to its employee Bradley Jones.[9]

As I have emphasized above, I was unimpressed with the substantive value of the subpoenaed material. My review of the remedy system documents revealed no significant probative evidence that was not known by the parties at the time the original hearing was concluded. Both counsel for the General Counsel and counsel for the Employer appear to be "grasping at straws" in implying that information in the subpoenaed documents supports their respective positions on the outstanding exceptions to my decision. As far as I am concerned, the arguments they now raise in their respective postsupplemental hearing briefs as to remedy system documents simply serve as an excuse for them to "rehash" all the old arguments that they made at the conclusion of the original hearing, or in their original briefs.[10]

In support of their respective positions on the outstanding exceptions, counsel for the Employer and counsel for the General Counsel use the remedy system documents by way of conjecture and supposition. There was no significant probative evidence offered by either party in support of their positions that was not previously known. Both counsels are diligent in defense of their clients' interest, and they demonstrate a natural instinct to "leave no stone unturned." However, what is now offered as new probative evidence is nothing more than the illusion of such.

The questioning of the two witnesses, Cathy Davis and Vicky Dodson, was limited by the undersigned to the issue of the adequacy of the production of the subpoenaed documents, and to the substantive issue concerning the exception to my

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[5] The acronym TLE stands for Tire, Lube, and Express.

[6] The petitioned for unit of TLE employees was opposed by the Employer, which took the position that the only appropriate unit was that comprised of all Kingman store employees.

[7] A comedy by William Shakespeare first published in 1600.

[8] The other exceptions filed by the General Counsel concerned my ruling that the remedy system documents were protected from subpoena by the attorney-client privilege.

[9] Originally, the Employer also filed an exception to my finding of a violation of the Act by its language in its associates benefit book. However, that allegation in the consolidated complaint was subsequently settled in an agreement between the Employer and the General Counsel, with the Board ordering the charge covering that allegation severed from the remainder of the case.

[10] In their postsupplemental hearing brief, counsels for the Charging Parties did not offer any specific remedy system documents as evidence in support of, or against, any outstanding exception. However, in the next section of this decision, I will specifically address the positions taken by counsels for the Charging Parties.

finding that the transfer of Store Manager Mike Buckner did not constitute a violation of the Act. I heard no testimony from either witness, which would constitute significant probative evidence not previously known.

As no party has offered any new substantive, probative evidence based on the subpoenaed documents or the testimony of Cathy Davis or Vicky Dodson, I conclude that there is no basis for me to alter any of my findings of fact or conclusions of law as set forth in my original decision in this case. Accordingly, I hereby reiterate my recommended Order dismissing certain paragraphs in the consolidated complaint and finding that other paragraphs have merit and establish violations of the Act, as set forth in my original decision in this case dated February 28, 2003.

Counsel for the General Counsel vigorously objected to my ruling limiting his questioning of Vicky Dodson to only those matters relevant to the one outstanding exception filed by the General Counsel, that being the transfer of Store Manager Mike Buckner. I specifically precluded counsel for the General Counsel from questioning Dodson or other witnesses regarding any of the outstanding exceptions filed by the Employer. Counsel argued that this constituted a denial of due process, as such evidence was contemplated in the Board's Remand Order.

To begin with, it should be noted that at the supplemental hearing counsel for the Employer offered no evidence in support of any of his outstanding exceptions. The two witnesses were called by the General Counsel and counsel for the Employer asked them no substantive questions regarding any of the outstanding exceptions. Counsel for the Employer did indicate at the hearing his intention of arguing his position on the outstanding exceptions in his posthearing brief, which he subsequently did.

As I have said, I did not find any significant probative evidence in either the subpoenaed material or the testimony of the two witnesses, which was not previously known. As such, there was no reason to allow further witness testimony. The Board's Remand Order directed me to "reopen the record to *receive relevant evidence* and make findings with respect thereto." (Emphasis added.) While the remedy system and related documents were admitted into evidence, the information contained therein was neither significant nor probative. Therefore, further inquiry regarding that evidence would not be relevant. In any event, I did not preclude any party from making any argument desired on the outstanding exceptions in respective posthearing briefs. I only precluded the parties from offering further witness testimony on matters that I concluded were not relevant under the provisions of the Remand Order.

As the administrative law judge conducting the hearing, I have the responsibility of managing the hearing. As such, I must decide whether further evidence is warranted. Based on the contents of the remedy system and related documents, I decided that such further evidence was not warranted. This does not constitute a denial of due process.

Counsel for the Charging Parties and, to a lesser extent, counsel for the General Counsel seem to be of the opinion that this case should go on in perpetuity. However, I am of the belief that based on the Board's Remand Order the supplemental hearing was quite limited in its scope. Having given all parties the opportunity to view the subpoenaed documents, ultimately having received them into evidence, and having given the parties the opportunity to question two witnesses about those documents, due process was provided to the parties in accordance with the Board's Remand Order. Due process does not require that a party be permitted to question witnesses endlessly about irrelevant information. To have further protracted this proceeding would, in my opinion, have been an unwarranted waste of the time and resources of all parties.

## II. THE UNIONS' ARGUMENTS AND ACTIONS

For the reasons that I noted earlier, I believe the Board's Remand Order contemplated a rather limited supplemental hearing. After all, 4 years ago the parties spent 13 days litigating this case. At the time of the original hearing, the Charging Parties were represented by a different lawyer. Rosenfeld and Sencer were not involved in that earlier proceeding. In any event, based on certain statements made and positions taken by Rosenfeld at the supplemental hearing and in his posthearing brief, I have come to the conclusion that the Charging Parties' "agenda" in this case is far removed from the limited hearing contemplated by the Board.

Rosenfeld's feelings about this case, the Board, and the Employer were not subtly displayed. His remarks were direct and unambiguous. On the record, he referred to the Board as "the Bush Labor Board," the Agency as a "dying agency," and the Employer as a "terrorist." His interest in this case clearly did not include a speedy adjudication of the outstanding issues before the undersigned. As he candidly admitted, "I don't care if this case delays for three years because . . . if I delay three years, I'm likely to see another Clinton Board and I'll get a more successful reception to this case than I will before the current Bush Board and delay is only in our favor for that reason."

As I informed Rosenfeld on the record, it is my duty to care about a speedy adjudication of these issues. The rights of all the parties required a resolution of these outstanding issues, which had originally been heard by the undersigned over 4 years ago. All parties suffer when "justice delayed is justice denied." That included the Employer's employees, most particularly Brad Jones, the discharged employee ordered reinstated with backpay by the undersigned. Further, I suggested to Rosenfeld that his interest seemed to be in creating a "cause celebre," to try the Employer for all the perceived wrongs ever committed against its employees, rather than to simply litigate the outstanding issues in this case. I informed him that I was not going to permit him to do this, and in so doing to turn the supplemental hearing into a "circus."

On November 20, 2006, prior to the commencement of the supplemental hearing, Rosenfeld issued a subpoena duces tecum to the Employer seeking 52 separate document categories. (CP Exh. 5, Subpoena No. B-468066.) The Employer filed a timely petition to revoke that subpoena. (CP Exh. 5.) In his petition, counsel for the Employer refers to the Union's subpoena as a "blunderbuss."[11] I agree with that characterization. The subpoena calls for the production of massive numbers of documents far outside the scope of the Board's Remand Order. Most of the documents it seeks are not even remotely related to the remaining issues before the undersigned. In my opinion it constitutes the ultimate "fishing expedition," apparently intended to obtain documents that can be used in other forums where the Unions and the Employer are engaged in litigation. I did not view the subpoena as a serious effort to obtain documents relevant only to the remaining issues in this case.

At the hearing, I granted the Employer's petition to revoke and quashed the Unions' subpoena as "incredibly burdensome, oppressive, and . . . not particularly relevant." I informed Rosenfeld that he was not precluded "from issuing an additional subpoena that [was] more reasonable in scope and more germane to the issues before us." However, the Unions issued no further subpoena duces tecum.

Counsel for the Unions, Rosenfeld, did at one point in the hearing mention an interest in issuing a subpoena for Tom Coughlin, who was formerly the Employer's vice chairman. I characterized the idea of issuing a subpoena for Coughlin as "silly." Later, counsel for Unions, Sencer, again mentioned a desire to have Coughlin testify. I made it clear to counsel that I would not permit Coughlin to testify as such testimony would not be relevant under the parameters of the Board's Remand Order. Coughlin's involvement in this case, consisting of a trip to Kingman during the organizing campaign, was fully disclosed and discussed during the original hearing. Extensive testimony was taken about Coughlin's activities at the store, including his conversations with various managers and meeting with employees. No party sought to subpoena Coughlin during the original hearing. The Unions' interest in now having Coughlin testify is untimely and inappropriate. I have seen no evidence in the remedy system and related documents as would constitute new probative evidence concerning Coughlin's involvement in the issues remaining before the undersigned.

I expressed to Sencer my view that the Unions' interest in having Coughlin testify went "way beyond the confines of this hearing." My suspicions were reinforced by Sencer's request to have admitted into evidence a judgment in a criminal case filed against Coughlin in the U.S. District Court for the Western District of Arkansas, as well as numerous articles from various newspapers and periodicals concerning Coughlin's alleged criminal activity. Those documents were in no way related to the limited issues still before the undersigned pursuant to the Board's Remand Order. Instead, they were clearly intended to try and embarrass the Employer, and to suggest in some general way that the Employer was antiunion and engaged in a national campaign to defeat union organizing by committing unfair labor practices. I sustained counsel for the Employer's objection to the admission of these documents into evidence, as constituting irrelevant material.[12]

As part of the Unions' efforts to transform this case from its limited scope under the Remand Order into something with national implications, counsel for the Unions, Rosenfeld, referred to the Employer as a recidivist employer, where a "broad remedy," a "nationwide remedy was appropriate." He took the position that the Board's earlier severance of that portion of the consolidated complaint dealing with the Employer's associates benefit book language was inappropriate, and that the Board should reverse itself.[13] As counsels for the Unions make clear in their postsupplemental hearing brief, not only are they asking for a nationwide notice posting, but they also request an intranet posting throughout the Employer's companywide intranet system.

As I explained to all parties at the supplemental hearing, whatever nationwide implications may have originally existed in this case were due only to the issue of the Employer's associates benefit book language, which had been distributed to employees nationwide. However, that portion of the consolidated complaint was previously severed by the Board. What remains before the undersigned is an 8(a)(1) and (3) case limited to those events that occurred at the Employer's store in Kingman, Arizona. While these are, of course, very significant and important issues to all parties and to the employees involved, they are issues that arose in the exclusive confines of the Unions' organizational campaign at the Kingman store. In my view, there is no basis for any extraordinary remedy, such as a nationwide notice posting or a posting on the Employer's intranet system. Further, the unfair labor practices found by the undersigned do not warrant "broad remedial language."[14]

The scope of the Board's Remand Order is limited. Those issues have been addressed in the supplemental hearing. As indicated above, I have concluded there is no basis to alter the findings of fact and conclusions of law that I issued in my original decision in this case. Further, I see no reason to alter the recommended remedy that I set forth in that decision. Accordingly, I decline to order the extraordinary remedy requested by the Unions.

In their postsupplemental hearing brief, counsels for the Unions ask that "the decision in this case [ ] be postponed until Wal-Mart produces the labor relations records which were taken by the FBI." Also, they state that "[t]he charging party is willing to wait until the labor relations records have been returned by the Federal Bureau of Investigation to Wal-Mart." This, of course, confirms the candid statements of Rosenfeld that he does not care about a delay in the case, as with a delay he hopes to "get a more successful reception to this case than I

[11] A blunderbuss is defined as, "an old-fashioned, short gun with large bore and flaring mouth, used for scattering shot at close range." See Funk & Wagnalls' Standard College Dictionary.

[12] At the request of counsel for the Unions, I agreed to have these documents placed in a rejected exhibit file to accompany the transcript as CP Exhs. 6–7.

[13] I had previously ordered as part of a remedy for that specific violation of the Act a nationwide notice posting. (See original ALJD.)

[14] In any event, no party filed any exception seeking an extraordinary remedy, beyond what I recommended in my original decision. Accordingly, this issue is not contemplated by the Board's Remand Order, and is not technically before me.

will before the current Bush Board and delay is only in our favor for that reason."

In my opinion, there is no basis for any further delay. Well over 4 years have passed since this case was originally heard. The remedy system and related documents have been admitted into evidence. I saw nothing in those documents as would warrant altering my original findings of fact and conclusions of law. Further, there is no reasonable expectation that the documents seized by the FBI would, if available, produce any new relevant evidence.

At some point all litigation must end. No litigation goes on indefinitely. In my view, due process has been provided to all parties in this case, and all relevant available evidence has now been received and considered. No useful purpose would be served by further delay.

[Recommended Order omitted from publication.]